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# A Primer on Kentucky Intestacy Laws

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# A Primer on Kentucky Intestacy Laws

BY CAROLYN S. BRATT\*

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## I. AN INTRODUCTION TO THE DESCENT OF REALTY AND DISTRIBUTION OF PERSONALTY

Some form of inheritance has existed since ancient times. The biblical story of Esau, who sold his birthright to his younger brother Jacob for a mess of pottage, demonstrates the long-standing recognition of inheritance rights.<sup>1</sup> Although the United States Constitution does not explicitly guarantee to the owner of property a right to transmit that property upon death to another person, the United States Supreme Court has held that a total abrogation of the right of inheritance without the payment of just compensation is unconstitutional.<sup>2</sup>

Every state has a system of inheritance created by statute and by case law.<sup>3</sup> State inheritance laws contemplate that the owner of property has died in one of two ways—"testate" (with a will) or "intestate" (without a will). A majority of all Americans die intestate without any directions as to the disposition of their property.<sup>4</sup> Consequently, the legislature of every jurisdiction has adopted statutes governing intestate succession.<sup>5</sup> Kentucky's laws on intestate inheritance are found in Kentucky Revised Statutes ("KRS") chapter 391 entitled "Descent and Distribution."

Today, there are few significant distinctions between intestate succession to real and personal property.<sup>6</sup> At the common law, however,

<sup>1</sup> *Genesis* 25:29-34.

<sup>2</sup> *Hodel v. Irving*, 481 U.S. 704, 716-17 (1987). *But see* *Hall's Adm'r v. Compton*, 281 S.W.2d 906, 910 (Ky. 1955) ("The right to dispose of an estate by will is not an inherent or natural right, but is permitted by statute."); *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

<sup>3</sup> *See* THOMAS E. ATKINSON, *LAW OF WILLS* 30 (2d ed. 1953).

<sup>4</sup> JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 75 (4th ed. 1990).

<sup>5</sup> *See id.* at 29.

<sup>6</sup> *But see* KY. REV. STAT. ANN. § 391.020 (Michie/Bobbs-Merrill 1984) (providing

different laws determined the identity of the intestate takers of real property and the intestate takers of personalty.<sup>7</sup> Thus, distinct, but parallel, technical vocabularies developed to describe succession based on the characterization of the decedent's property as real or personal.<sup>8</sup> For example, "descent" refers to the devolution of intestate real property, while "distribution" denominates the intestate succession to personalty.<sup>9</sup> Those to whom the decedent's real property descends are "heirs," and those who take the decedent's personal property are "next of kin" or "distributees."<sup>10</sup>

The intestacy scheme in Kentucky only applies to property remaining in the decedent's estate after application of the dower chapters. The statutory provisions on dower contained in KRS chapter 392 usually determine the rights of a surviving spouse in Kentucky. The surviving spouse is an intestate taker only if the deceased spouse was not survived by a child, a descendant of a child, a parent, a sibling, or a descendant of a sibling.<sup>11</sup> Therefore, when there is a surviving spouse, before determining the proper intestate distribution of the decedent's property, reference must be made to the dower chapter.

#### *A. The Source and Nature of the Law Governing Intestate Succession*

##### *1. Statutory Succession*

Because the right of intestate succession to property is purely statutory, Kentucky's statutes on descent and distribution, not the intentions of the decedent, determine the identity of the intestate takers.<sup>12</sup> For example, in

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that ancestral real property passes differently than nonancestral realty and all personalty).

<sup>7</sup> WILLIAM M. MCGOVERN ET AL., *WILLS, TRUSTS AND ESTATES* § 1.1 (1988).

<sup>8</sup> A similar phenomenon is present in the technical vocabulary of testate inheritance of real and personal property. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* Such linguistic distinctions are, for the most part, lost on the public and are not consistently honored in court opinions or in the statutes. For instance, "heir" is commonly used interchangeably with "next of kin" to refer to an intestate taker of either real or personal property.

<sup>11</sup> KY. REV. STAT. ANN. § 391.010(1)-(4) (Michie/Bobbs-Merrill 1984).

<sup>12</sup> See *Ryburn v. First Nat'l Bank of Mayfield*, 399 S.W.2d 313, 315 (Ky. 1965) (holding that a grandniece and grandnephew could not contest the testator's will because an intervening intestate taker under the statute was still living); *Richardson's Adm'r v. Borders*, 54 S.W.2d 676, 677-78 (Ky. 1932) (sustaining the constitutionality of a statute that disqualified a child born during a marriage from inheriting from his mother's husband because the husband had divorced the mother on the ground that she was pregnant by another before the marriage); see also *Traughber v. King*, 32 S.W.2d 8, 11 (Ky. 1930) (holding that a Kentucky statute requires that advancements made by the testator be taken

*Hall's Administrator v. Compton*<sup>13</sup> the decedent died testate as to one-third of her estate and intestate as to the other two-thirds. The will provisions in favor of one of the decedent's four nieces and nephews evidenced an intention not to provide for the other three.<sup>14</sup> Nonetheless, all of the nieces and nephews shared equally in the intestate property because they were, as a class, the statutorily designated intestate takers of the decedent.<sup>15</sup> This legislative power to determine intestate takers is not limited to merely determining priorities among classes of blood relatives of the decedent. It also encompasses the power to authorize inheritance by people related to the decedent by marriage and adoption.<sup>16</sup> The only way that a decedent can disinherit a statutorily designated intestate taker is by the affirmative act of bequeathing all of the decedent's estate to others in a validly executed will.

The identification of a decedent's intestate takers takes place at the moment of the decedent's death.<sup>17</sup> Therefore, a postmortem contract of release that an intestate taker of the testator executes in the settlement of a potential will contest will not alter the determination of heirship made by the intestacy statutes based on the facts extant at the moment of death.<sup>18</sup> In *Ryburn v. First National Bank of Mayfield*, a grandniece and a grandnephew of the testator sought to contest the testator's will.<sup>19</sup> In order to have standing to contest the will, the grandniece and grandnephew needed a strict pecuniary interest adverse to the will.<sup>20</sup> The contestants in *Ryburn* claimed to be

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into account in determining the share of the testator's children).

<sup>13</sup> 281 S.W.2d 906 (Ky. 1955).

<sup>14</sup> *Id.* at 910.

<sup>15</sup> *Id.*; see KY. REV. STAT. ANN. § 391.010(3) (Michie/Bobbs-Merrill 1984).

<sup>16</sup> *Woods v. Crump*, 142 S.W.2d 680, 682 (Ky. 1940) (construing a prior statute on inheritance rights of an adopted child). Inheritance by nonblood relatives is authorized by KY. REV. STAT. ANN. §§ 199.520(2) (adopted child), 391.010(4) (husband or wife of decedent), and 391.010(6) (kindred of husband or wife of decedent).

<sup>17</sup> *Rose v. Rose*, 176 S.W.2d 122, 124 (Ky. 1943) (intestate takers of real property); *Farmers' Exchange Bank of Millersburg v. Moffett*, 75 S.W.2d 1063, 1065 (Ky. 1934) (intestate takers of personal property); see also *Skinner v. Morrow*, 318 S.W.2d 419, 424 (Ky. 1958) (holding that the share of the decedent's spouse is determined by the law in effect at the time of the decedent's death, not the law in effect at the time of distribution of the estate).

<sup>18</sup> *Ryburn v. First Nat'l Bank of Mayfield*, 399 S.W.2d 313 (Ky. 1965). For a full statement of the facts of *Ryburn*, see *Annie Gardner Foundation v. Gardner*, 375 S.W.2d 705 (Ky. 1963).

<sup>19</sup> *Ryburn*, 399 S.W.2d at 313-14.

<sup>20</sup> See *Eckert v. Givan*, 183 S.W.2d 809, 811-12 (Ky. 1944) (holding that the heirs of the widow of the testator could not contest the will, as they would not be entitled to an intestate share of the testator's estate); *Rogers v. Leahy*, 176 S.W.2d 93, 95 (Ky. 1943) (holding that the inchoate curtesy right of the spouse of an heir of the testator does not enable the heir's spouse to contest the will because the spouse would not be entitled to

unprovided for intestate takers of the testator, which, if true, satisfied the strict pecuniary interest requirement.<sup>21</sup> However, the court dismissed their suit for lack of standing because their grandfather (a brother of the testator) and their father (a nephew of the testator) had been alive at the testator's death.<sup>22</sup> By statute, surviving siblings of the decedent (the grandfather) take in intestacy to the exclusion of the siblings' own descendants (the father and the contestants).<sup>23</sup> An agreement later entered into between the grandfather, the father, and the testator's estate in which the grandfather and the father released all claims in the estate of the testator<sup>24</sup> did not cure the contestants' lack of standing because the statutes fix the death of the decedent as the relevant time for determining the identity of the intestate takers.<sup>25</sup>

## 2. *Limitations on the Legislative Power*

Although the legislature's power to regulate the descent and distribution of intestate property is very broad, it is not limitless. Both the Kentucky Constitution and the United States Constitution impose restrictions on the legislature's power to define and alter rights of succession to intestate property.

Section 59 of the Kentucky Constitution generally prohibits the legislature from enacting a special law when a general law can be made applicable.<sup>26</sup> That section also particularly prohibits the enactment of special laws that affect the estate of a decedent<sup>27</sup> or of local laws that change the law of descent, distribution, or succession within a particular area.<sup>28</sup> Therefore, the legislature cannot enact a change in the law of succession if the resulting law is "confined to territorial limits other than that of the whole state . . . , is applicable to some political subdivision and not to others,"<sup>29</sup> or "arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors others."<sup>30</sup>

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an intestate share of the testator's estate). *See generally* ATKINSON, *supra* note 3, § 99 (describing the parties who may contest a will).

<sup>21</sup> *Ryburn*, 399 S.W.2d at 314.

<sup>22</sup> *Id.* at 315.

<sup>23</sup> KY. REV. STAT. ANN. § 391.010(3) (Michie/Bobbs-Merrill 1984).

<sup>24</sup> *Annie Gardner Foundation v. Gardner*, 375 S.W.2d 705 (Ky. 1963).

<sup>25</sup> *Ryburn*, 399 S.W.2d 314-15; *see also* cases cited *supra* note 17.

<sup>26</sup> KY. CONST. § 59(29).

<sup>27</sup> *Id.* at § 59(6).

<sup>28</sup> *Id.* at § 59(8).

<sup>29</sup> *Board of Educ. of Jefferson County v. Board of Educ. of Louisville*, 472 S.W.2d 496, 498 (Ky. 1971) (defining a local act).

<sup>30</sup> *Id.* (defining a special law).

For example, KRS section 381.280, which disqualifies a killer convicted of the felony from inheriting from the victim,<sup>31</sup> was challenged in *Wilson v. Bates*<sup>32</sup> as unconstitutional special legislation. Although the statute appears to affect the inheritance of only a specific class, it is a general, and not a special, law because it applies uniformly to all members of the class that it creates.<sup>33</sup> Nor does the statute violate the mandate of Section 20 of the Kentucky Constitution against forfeiture of estate.<sup>34</sup> Rather than depriving the killer of any property, the statute merely prevents the killer from acquiring property through intestate succession.<sup>35</sup>

Section 21 of the Kentucky Constitution contains two other provisions expressly affecting inheritance rights.<sup>36</sup> First, in the case of suicide, the decedent's property still descends or is distributed as if the decedent had died a natural death. Second, a casualty death, rather than a natural death, does not cause a forfeiture of the decedent's estate.<sup>37</sup>

The Fourteenth Amendment of the United States Constitution provides the most obvious source of federal constitutional limitations on the state's power to regulate inheritance.<sup>38</sup> The Equal Protection Clause imposes significant limitations on the state's power to classify on the basis of race, gender, and illegitimacy in regulating descent and distribu-

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<sup>31</sup> KY. REV. STAT. ANN. § 381.280 (Michie/Bobbs-Merrill 1984).

<sup>32</sup> *Wilson v. Bates*, 231 S.W.2d 39 (Ky. 1950) (son killed both parents and was convicted of the felony).

<sup>33</sup> *Id.* at 41.

<sup>34</sup> The section provides: "No person shall be attained of treason or felony by the General Assembly, and no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the Commonwealth." KY. CONST. § 20.

<sup>35</sup> *Wilson*, 231 S.W.2d at 41-42 (Since "[t]he acts of killing [the victims] took place immediately before they died, . . . [the defendant] forfeited his rights to inherit from them immediately before they died . . . [and] no part of their estate was vested in him by reason of their death."); *Heuser v. Cohen*, 655 S.W.2d 9, 11 (Ky. Ct. App. 1982) (holding that where husband and wife jointly-owned casualty insurance on property held as tenants by the entirety and husband murdered his wife, the forfeiture statute prevents husband from taking all of the property under a right of survivorship, but husband may retain one-half of the property under equitable principles).

<sup>36</sup> The section provides: "The estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof." KY. CONST. § 21.

<sup>37</sup> *Id.*

<sup>38</sup> U.S. CONST. amend. XIV, § 1 provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

tion.<sup>39</sup> For example, in *Reed v. Reed*<sup>40</sup> the United States Supreme Court struck an Idaho statute that directed that if equally qualified applicants competed for appointment as administrator of an intestate estate, the male applicant was to be preferred over the female applicant. The statute offended the Equal Protection Clause because the gender-based classification it employed was not substantially related to an important governmental objective.<sup>41</sup>

Similarly, the United States Supreme Court invalidated an Illinois statute that provided that a child born out of wedlock could inherit from the father only if the father acknowledged the child and if the parents married.<sup>42</sup> This federal equal protection decision, as applied by the Kentucky Supreme Court in *Pendleton v. Pendleton*,<sup>43</sup> led to a declaration of the unconstitutionality of a similar Kentucky statute controlling the inheritance rights of children born out of wedlock.

The Fourteenth Amendment also guarantees that property owners will receive due process before the state deprives them of their property.<sup>44</sup> Prospective legislative changes in the rules governing succession to property do not offend this guarantee.<sup>45</sup> As a living person has no heirs or distributees,<sup>46</sup> no one presently exists whose rights are impermissibly affected by prospective legislative changes in intestate succession.<sup>47</sup> Additionally, no citizen, including heirs and distributees expectant, has a protectable property interest in the continued existence of a statute.<sup>48</sup>

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<sup>39</sup> See generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1136 (1978) (equal protection analysis).

<sup>40</sup> 404 U.S. 71 (1971).

<sup>41</sup> *Id.* at 75-76; see also *Craig v. Boren*, 429 U.S. 190 (1976) (striking down an Oklahoma statute that prohibited the sale of 3.2% beer to males under the age of 21 and to females under the age of 18 as violative of the Equal Protection Clause).

<sup>42</sup> *Trimble v. Gordon*, 430 U.S. 762, 764-66 (1977).

<sup>43</sup> 560 S.W.2d 538 (Ky. 1977).

<sup>44</sup> U.S. CONST. amend. XIV, § 1.

<sup>45</sup> *Kolb v. Ruhl's Adm'r*, 198 S.W.2d 326, 328 (Ky. 1946) (finding that the inheritance rights of an adopted child are governed by a statute enacted after the adoption, but prior to decedent's death); *Richardson's Adm'r v. Borders*, 54 S.W.2d 676, 677 (Ky. 1932) (sustaining legislation that barred a child born during a lawful marriage from inheriting from the mother's husband if the mother were later adjudged to have been pregnant by another at the time of the marriage, although such a child would have been an heir under previous law).

<sup>46</sup> JOHN SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 111 (1953).

<sup>47</sup> *Arciero v. Hager*, 397 S.W.2d 50, 53-54 (Ky. 1965), *overruled on different grounds by Hicks v. Enlow*, 764 S.W.2d 68, 71-72 (Ky. 1989).

<sup>48</sup> SCURLOCK, *supra* note 46, at 108-09.



It is uniformly recognized, however, that at the moment the property owner dies, the property rights of the takers become fixed or vested.<sup>49</sup> Because of the due process guarantees of the Fourteenth Amendment, the legislature may not thereafter divest those takers of substantive rights conferred upon them by virtue of the statutes in effect at the death of the decedent. The Kentucky Court of Appeals applied this prohibition against legislation that divests already vested property rights in its decisions concerning the effect of the Weissinger Act<sup>50</sup> on a husband's curtesy rights in his wife's property.<sup>51</sup> The Act removed many of the common law disabilities suffered by married women, including the elimination of the husband's right, upon marriage, to acquire title to so much of his wife's personal property as he reduced to his possession.<sup>52</sup> The court of appeals determined that the statute did not divest a husband of title to that part of his wife's personal property that he had reduced to his possession prior to the adoption of the Act.<sup>53</sup> However, the statute did eliminate his right to acquire title to personal property his wife had acquired before the adoption of the Act but which he had not yet reduced to possession and his right to personal property she acquired after the effective date of the Act.<sup>54</sup>

Retroactive legislation that merely effects procedural, rather than substantive, changes does not violate due process guarantees.<sup>55</sup> Also,

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<sup>49</sup> *Id.* at 116; *Richardson's Adm'r*, 54 S.W.2d at 677 ("Those named as heirs and distributees in the existing laws of descent and distribution have no vested rights until the intestate's death. . ."); *Butler v. Butler*, 4 Ky. Op. 653, 654 (1872) (surviving spouse's rights as well as those of the decedent's heirs vested at the decedent's death and "no subsequent legislation can divest them of [that] interest").

<sup>50</sup> 1894 Ky. Acts, ch. 76, § 37 (current version at KY. REV. STAT. ANN. § 404.010 (Michie/Bobbs-Merrill 1984)).

<sup>51</sup> *E.g.*, *Mitchell v. Violet*, 47 S.W. 195, 196 (Ky. 1898) (finding that the Act did not deprive the husband of his life interest in his wife's real property because, prior to the Act's adoption, the marriage took place, the wife's land was acquired, and a child of the marriage was born alive); *Rose v. Rose*, 46 S.W. 524 (Ky. 1898) (finding that the Act did not deprive the husband of his rights to use land that his wife had acquired before the Act, to rent the land for three years at a time, and to receive the rents, because they married prior to the adoption of the Act).

<sup>52</sup> *Phillips v. Farley*, 66 S.W. 1006 (Ky. 1902) (holding that the Act deprived the husband of a life interest in real property of his wife because a child of the marriage was not born alive prior to the adoption of the Act).

<sup>53</sup> *Fowler v. Fowler*, 127 S.W. 1014, 1016 (Ky. 1910).

<sup>54</sup> *Id.*

<sup>55</sup> *Cf.* *Heath v. Hazelip*, 167 S.W. 905, 907-09 (Ky. 1914) (holding that a statute of limitations for recovery of real property may be shortened retroactively if a reasonable period of time is allowed under the new statute to bring actions not time-barred under the old statute).

litigation concerning intestate or testate inheritance does not divest an heir or devisee of a vested property interest in violation of the Due Process Clause. Such litigation merely determines which of the parties is the rightful owner of the property.<sup>56</sup>

The Fifth Amendment's prohibition against taking private property for public use without just compensation is applied to the states by way of the Fourteenth Amendment's Due Process Clause.<sup>57</sup> Decisions by both the United States Supreme Court<sup>58</sup> and the Kentucky Supreme Court<sup>59</sup> have recognized that an exercise of the state's police powers amounts to a taking if it substantially defeats the owner's property interest. One of the attributes of property ownership is the ability of the owner to transfer ownership of that property at death. In *Hodel v. Irving*<sup>60</sup> the United States Supreme Court held that an unconstitutional "taking" occurred when Congress purported to totally eliminate both the descent and devise of certain types of property interests in Indian trust land.<sup>61</sup> Thus, the Commonwealth of Kentucky may not totally abrogate the right of inheritance without incurring the constitutional obligation to pay just compensation.

### 3. *Time for Determining Heirship*

The relevant statutes for determining the identity of a decedent's intestate takers and their shares are the statutes in effect at the death of the dece-

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<sup>56</sup> *Wills v. Lochmane*, 72 Ky. (9 Bush) 547, 549-50 (1873) ("[W]hen [will contests] are settled by the courts in accordance with the law and facts of the particular case the judgment does not deprive the unsuccessful party of his property, but declares that as [a] matter of law he does not own the property.").

<sup>57</sup> *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

<sup>58</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (invalidating a Pennsylvania statute which forbade mining that caused subsidence of buildings used for human habitation); see also *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (sustaining New York City's Landmarks Preservation Law as applied to Grand Central Station).

<sup>59</sup> *Commonwealth v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984) (defining a "taking" as depriving the owner of all beneficial enjoyment and holding, therefore, that mere passage of the Wild Rivers Act did not constitute a taking); *Commonwealth v. Stephens*, 539 S.W.2d 303, 305-06 (Ky. 1976).

<sup>60</sup> 481 U.S. 704 (1987).

<sup>61</sup> *Id.* at 717-18. Section 207 of the Indian Land Consolidation Act provided: "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than \$100 in the preceding year before it is due to escheat."

481 U.S. at 709 (quoting the Indian Land Consolidation Act of 1983, 25 U.S.C. § 2206 (1982) (later amended)).

dent.<sup>62</sup> In *White v. White*<sup>63</sup> the intestacy statute in effect at the time that the litigation arose would have permitted the claimant to be an intestate taker of the decedent, even though the claimant was not a United States citizen. However, the court denied the claimant any share in the decedent's estate because he was ineligible to inherit under the statute that was in effect at the time of the decedent's death.<sup>64</sup> Similarly, the rights of the surviving spouse in the deceased spouse's estate, other than dower, are determined by the statutes in effect at the death of the decedent.<sup>65</sup> Legislation adopted subsequent to the decedent's death cannot defeat the rights of a surviving spouse or other intestate takers.<sup>66</sup>

The decedent's death is also the critical point for classifying the decedent's assets and for determining whether a local administrator is necessary. The nature of the decedent's property at the death of the decedent determines whether the property is personalty or realty for the purposes of descent and distribution.<sup>67</sup> A subsequent change in the form of an asset such as that which occurs when real property is sold for cash does not change the initial classification of that asset.<sup>68</sup> Moreover, the determination as to the presence or absence of property or debts owed to the decedent within Kentucky is made as of the date of the decedent's death.<sup>69</sup> The presence or absence of such property is a prerequisite to the appointment of a local administrator for the decedent's estate.

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<sup>62</sup> See *Arciero v. Hager*, 397 S.W.2d 50, 53 (Ky. 1965) (holding that the law existing at the decedent's death, not the law existing at the time of adoption, controls inheritance rights of an adoptee), *overruled on different grounds by* *Hicks v. Enlow*, 764 S.W.2d 68, 71-72 (Ky. 1989); *Kolb v. Ruhl's Adm'r*, 198 S.W.2d 326, 328 (Ky. 1947) (holding that right of an adopted child to inherit from or through an adopting parent is determined by the law of succession as it exists at decedent's death).

<sup>63</sup> 59 Ky. (2 Met.) 185 (1859).

<sup>64</sup> *Id.* at 188.

<sup>65</sup> See *Blades v. Blades' Adm'r*, 159 S.W.2d 407, 409 (Ky. 1942) (holding that intestate personalty exempted by statute from distribution and sale vests absolutely in surviving spouse or distributee at moment of decedent's death); *Howard v. Mitchell*, 105 S.W.2d 128, 131 (Ky. 1937) (finding that the statute in effect at decedent's death determines the homestead rights of the surviving spouse).

<sup>66</sup> *Butler v. Butler*, 4 Ky. Op. 653 (1872) ("The rights of the widow and heirs, in and to the estate of the decedent vested in them, at his death, and no subsequent legislation can divest them of the interest they acquired.").

<sup>67</sup> *Cf. Gaskins v. Gaskins*, 223 S.W.2d 374, 376 (Ky. 1949) (holding that intestate realty located in Kentucky is not subject to a surviving spouse's lien acquired by her in the state of the decedent's domicile).

<sup>68</sup> *Id.* at 376.

<sup>69</sup> *Payne v. Payne*, 39 S.W.2d 205, 207 (Ky. 1931).

*B. Choice of Law**1. Applicable Choice of Law Principles*

In the context of intestate succession, choice of law involves determining which state's law decides who the intestate takers are and what share each should take from the decedent's estate.<sup>70</sup> No choice of law question arises if the decedent dies domiciled in the same state in which all of the decedent's property is located. In that case, the law of the decedent's domicile at death governs any issue of intestate succession to all of the decedent's property because it is all within that state. If, however, the decedent owns any property that is located in a state that is not the decedent's domicile at death, a choice of law issue arises. For example, hypothesize a decedent who was a Kentucky domiciliary at death and who had real property and bank accounts located in both Kentucky and State *X*. Under the intestacy laws of Kentucky, the decedent's surviving spouse is entitled to approximately one-half of the decedent's real and personal property, whereas in State *X* a surviving spouse is entitled to only one-third of that property. Should the law of Kentucky or State *X* determine the rights of the surviving spouse?

Two choice of law principles of almost universal application are available for solving this problem. First, the law of the situs of "immovables" determines every question concerning those assets of the decedent.<sup>71</sup> Thus, in our hypothetical, Kentucky's laws of intestate succession would control the descent of the real property located in Kentucky, and the surviving spouse would take a one-half interest in that property. By the same token, the law of State *X* would control the descent of the real property that is located within its boundaries. Therefore, the surviving spouse would take only one-third of the realty in State *X*.

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<sup>70</sup> RUSSEL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 1.3 (2d ed. 1980). This book does not cover the other major conflict of law issues: (1) where suit may be brought and (2) the effect of a judgment on suits in other jurisdictions.

<sup>71</sup> *Gaskins*, 223 S.W.2d at 376 (holding that intestate realty located in Kentucky is not subject to a surviving spouse's lien acquired by her in the state of the decedent's domicile); *Sneed v. Ewing*, 28 Ky. (5 J.J. Marsh.) 460, 465 (1831) (finding that in order to pass title to realty located in Kentucky, a foreign will must be executed in conformity with the laws of Kentucky); see also *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823) (holding that title to realty can be determined only by the laws of the state under which it was acquired).

The second choice of law principle is that the law of the decedent's domicile at death controls the distribution of "movables," regardless of the actual, physical location of the "movables."<sup>72</sup> Kentucky has codified this principle in KRS section 395.260.<sup>73</sup> Therefore, in the hypothetical case set out above, Kentucky's statutory scheme of intestate succession would apply to the bank accounts in *both* Kentucky and State *X* without regard to the intestate succession laws of State *X*. The surviving spouse would take one-half of the monies on deposit in both of the accounts.

The terms "real property" and "personal property" are often substituted for the terms "immovables" and "movables" in the expression of these choice of law principles. These substitutes may be inaccurate, however, since all real property is immovable, but not all personal property is movable. For example, although leasehold interests in real property are generally classified as personal property interests, for the purposes of the choice of law rules a leasehold is an "immovable."<sup>74</sup>

Kentucky case law does not recognize any exceptions to the rule that the law of the situs of immovables controls their descent and distribution. However, there are some case law exceptions to the rule that the law of the decedent's domicile at death controls the descent and distribution of movables. In *McDonald v. McDonald's Administrator*,<sup>75</sup> the Court of Appeals of Kentucky distributed damages that a Kentucky administrator had recovered under another state's wrongful death statute, in accordance with the requirements of that state's wrongful death statute even though those monies were a "movable."<sup>76</sup> Since Kentucky was the decedent's domicile at death,

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<sup>72</sup> *Payne*, 39 S.W.2d at 208 (a foreign decedent's personalty located in Kentucky must be distributed according to the laws of the decedent's domicile).

<sup>73</sup> KY. REV. STAT. ANN. § 395.260 (Michie/Bobbs-Merrill 1984). The statute provides:

[A]dministration . . . [of] the estate of a nonresident decedent . . . may either be distributed and disposed of according to the law of the decedent's domicile . . . or . . . may be transmitted to the personal representatives . . . in the state of the decedent's domicile, to be disposed of there according to the law of that state.

<sup>74</sup> WEINTRAUB, *supra* note 70, § 8.2; *see also Sneed*, 28 Ky. (5 J.J. Marsh.) at 481 (finding that although slaves were technically classified as realty, they were treated as "movables" for choice of law purposes).

<sup>75</sup> 15 Ky. L. Rptr. 367 (1893).

<sup>76</sup> *Id.* at 367-68.

the choice of law rule for movables should have directed that Kentucky law control the distribution.

In another exceptional case,<sup>77</sup> the court distributed a foreign domiciliary's "movables," which were securities held by a Kentucky trust company, according to the intestacy laws of Kentucky instead of the laws of the decedent's domicile at death. The court made this exception because, prior to leaving Kentucky to take up residence in another state, the decedent had transferred the securities in trust to the trust company, and the securities remained in the trust company's possession at the decedent's death. A written instrument accompanying this transfer provided that the securities were to remain in Kentucky and were to pass according to Kentucky's intestacy laws in the absence of an inter vivos revocation of the agreement or an alternative testamentary disposition of the securities. The court gave effect to the decedent's intention instead of applying the general choice of law rule.<sup>78</sup>

## 2. *Incidental Questions*

The choice of law principles discussed above do not resolve "incidental questions" that may arise when the relevant state law is applied to an intestate distribution question.<sup>79</sup> For example, while the relevant choice of law principles determine the size of the share which a surviving spouse takes in the decedent's various assets, those choice of law principles do not determine whether the claimant is the decedent's "surviving spouse." That issue involves the validity of any alleged marriage between the decedent and the claimant. The law of the state where the marriage was celebrated and the law of the state(s) where the decedent and the claimant were domiciled at the time of the marriage determine the validity of the marriage.<sup>80</sup>

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<sup>77</sup> *Lee v. Belknap*, 173 S.W. 1129 (Ky. 1915).

<sup>78</sup> *Id.* at 1133-34; *see also Shaw v. Grimes*, 218 S.W. 447, 448 (Ky. 1919) (restating the orthodox choice of law rule for immovables but noting that some states recognize an exception to this rule that the law of the testator's domicile controls when the intention of the testator is sought to be ascertained from the language used in the will).

<sup>79</sup> WEINTRAUB, *supra* note 70, § 3.4A n.96 ("[a]n 'incidental question' arises when, in applying the law of the state chosen by conflict analysis, terms utilized in that law must be defined by further conflict analysis"); A.B. Gotlieb, *The Incidental Question Revisited—Theory and Practice in the Conflict of Laws*, 26 INT'L & COMP. L.Q. 734 (1977).

<sup>80</sup> WEINTRAUB, *supra* note 70, § 3.4A n.96.

The law of the state that determines the validity of a marriage also determines the legitimacy or illegitimacy of the children of that marriage.<sup>81</sup> Once a court determines the status of a claimant as legitimate or illegitimate, the law of the situs for immovables and the law of the decedent's domicile for movables establish the intestate share of that legitimate or illegitimate claimant.<sup>82</sup> Similarly, the law of the forum of the adoption determines a claimant's status as an adopted child of the decedent.<sup>83</sup> However, the intestate inheritance rights of the adopted child are then determined in accordance with the two general choice of law rules.<sup>84</sup> For example, a child who was validly adopted in Indiana inherited his mother's real property located in Kentucky because Kentucky's intestacy laws controlled and, under Kentucky's descent and distribution statutes, an adopted child had the same rights as a birth child.<sup>85</sup> Conversely, a child who was validly adopted in New York was not permitted to inherit in Kentucky from his natural, paternal great-uncle.<sup>86</sup> Although New York law was to the contrary, Kentucky's intestacy statutes totally cut off an adopted child's right to inherit from or through her or his birth parents.<sup>87</sup>

### 3. *Domicile*

Because one must refer to the law of the decedent's domicile at death to ascertain who takes and in what share, determination of which state was the decedent's domicile can become crucial. It is beyond the scope of this Article to explore the illusive concept of

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<sup>81</sup> *Leonard v. Braswell*, 36 S.W. 684, 686 (Ky. 1896) (determining that decedent's grandchildren were illegitimate because in Illinois, the forum of their parents' marriage, the marriage was bigamous and the offspring illegitimate).

<sup>82</sup> *Id.* at 687 (explaining that although illegitimate under Illinois law, the law of the forum of the marriage, the grandchildren of a Kentucky decedent could inherit because Kentucky permits inheritance by illegitimate offspring).

<sup>83</sup> *Arciero v. Hager*, 397 S.W.2d 50, 51 (Ky. 1965) (stating that the law of the forum of the adoption controls unless the status so created is repugnant to the public policy of the state in which the adopted status is asserted), *overruled on different grounds by Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989).

<sup>84</sup> *Id.* at 52.

<sup>85</sup> *Pyle v. Fischer*, 128 S.W.2d 726, 727 (Ky. 1939).

<sup>86</sup> *Arciero*, 397 S.W.2d at 53, *overruled on different grounds by Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989).

<sup>87</sup> *Id.* at 51.

domicile.<sup>88</sup> However, as such a determination turns on various factual issues, an appellate court will not generally set aside the decision of a trial court with respect to domicile.<sup>89</sup>

After one has identified, through the use of appropriate choice of law principles, which state's law applies, the law of that state will apply regardless of whether that law is statutory, case law, or civil law.<sup>90</sup> Although the law of a nondomiciliary state controls the descent of immovables located within that state, the primary administration of the decedent's estate should take place where the decedent was domiciled at death.<sup>91</sup> Ancillary administration in a nondomiciliary state in advance of intestate administration in the decedent's domiciliary state is only permitted under circumstances requiring the immediate protection of rights, the prevention of a loss, or the preservation of some interest.<sup>92</sup>

## II. THE PATTERN OF INTESTATE INHERITANCE

A system of intestate inheritance can be predicated on blood relationships, social bonds, participation in the creation of the decedent's wealth, or ability to make the most productive use of the decedent's property. Kentucky has chosen a pattern of intestate inheritance that weighs heavily in favor of keeping the decedent's property within the bloodline.<sup>93</sup> Kentucky's statutory scheme also embodies a strong legislative preference for intestate inheritance and against escheat. As Figure 1 illustrates, inheritance is never cut off because of the remoteness of the degree of relationship of the blood relative to the decedent. Escheat

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<sup>88</sup> For an in-depth discussion, see WEINTRAUB, *supra* note 70, §§ 2.1-2.16.

<sup>89</sup> *Fidelity Trust Co. v. Williams*, 105 S.W. 952, 954 (Ky. 1907) (sustaining the finding of a trial court that a person who maintained an apartment in Louisville, Kentucky, for thirty-eight years was nonetheless a domiciliary of Tennessee); *see also* *Temple v. Brittan*, 12 S.W. 306, 306 (Ky. 1889) (demonstrating unwillingness to disturb the trial court's determination of domicile).

<sup>90</sup> *Lee v. Belknap*, 173 S.W. 1129, 1138 (Ky. 1915).

<sup>91</sup> *Payne v. Payne*, 39 S.W.2d 205, 208 (Ky. 1931) (denying probate of foreign testator's holographic will because no sufficient reasons appeared for probating the will in Kentucky in advance of the will's probate at the testator's domicile).

<sup>92</sup> *Id.*

<sup>93</sup> *See, e.g.,* KY. REV. STAT. ANN. § 391.020 (Michie/Bobbs-Merrill 1984) (providing that real property acquired as a gift or inheritance from a parent shall descend to the parent or the parent's heirs if the decedent dies intestate and without issue); *id.* § 391.050 (giving half-blood relations a half-share).



because of a failure of intestate takers occurs only if the entire descending, ascending, and collateral lines of both the decedent and of the decedent's spouse are exhausted.<sup>94</sup> Under this intestacy scheme, inheritance by consanguineous (related by blood) and affinal (related by marriage) "laughing heirs"<sup>95</sup> is likely to occur.

Kentucky's system of intestate inheritance is antiquated in comparison to the modern trend toward eliminating inheritance by those more remotely related to the decedent than grandparent or issue of a grandparent.<sup>96</sup> Nonetheless, Kentucky's intestacy laws generally do not perpetuate the common law distinctions between the distribution of intestate personalty and the descent of intestate realty. With a few exceptions,<sup>97</sup> characterization of the decedent's assets as either realty or personalty does not affect succession to the net estate of the decedent after payment of exemptions, debts, and dower, if any. The statutes mandate distribution of the intestate's personal property among the same persons and in the same proportions as they require the descent of the intestate's real estate.<sup>98</sup> Similarly, Kentucky's statutory scheme rejects the common law preference for males over females, the doctrine of primogeniture, and the exclusion of ancestors from intestate inheritance.<sup>99</sup>

When there is more than one intestate taker, each taker becomes the sole owner of that taker's respective fractional interest in the decedent's personal property. With respect to the decedent's real property, multiple takers inherit their respective fractional interests as tenants in common because the common law preference for joint tenancies has been eliminated by statute.<sup>100</sup> All of the tenants in common, regardless of the size of their respective fractional interest, have co-extensive rights or privileges in any election, division, or other matter concerning the lands that descended to them.<sup>101</sup>

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<sup>94</sup> *Id.* § 391.010(6).

<sup>95</sup> "Laughing heirs" are relatives which are only distantly related to the decedent. MCGOVERN ET AL., *supra* note 7, § 1.3.

<sup>96</sup> E.g., UNIF. PROBATE CODE § 2-103, 8 U.L.A. 60 (1987) (adopting a scheme which eliminates inheritance by those more remotely related than the decedent's grandparent or issue of the decedent's grandparent).

<sup>97</sup> KY. REV. STAT. ANN. § 391.020 (Michie/Bobbs-Merrill 1984) (requiring ancestral real property to pass differently than nonancestral realty and all personalty); *id.* § 391.030(1) (requiring debt to be taken from personalty first).

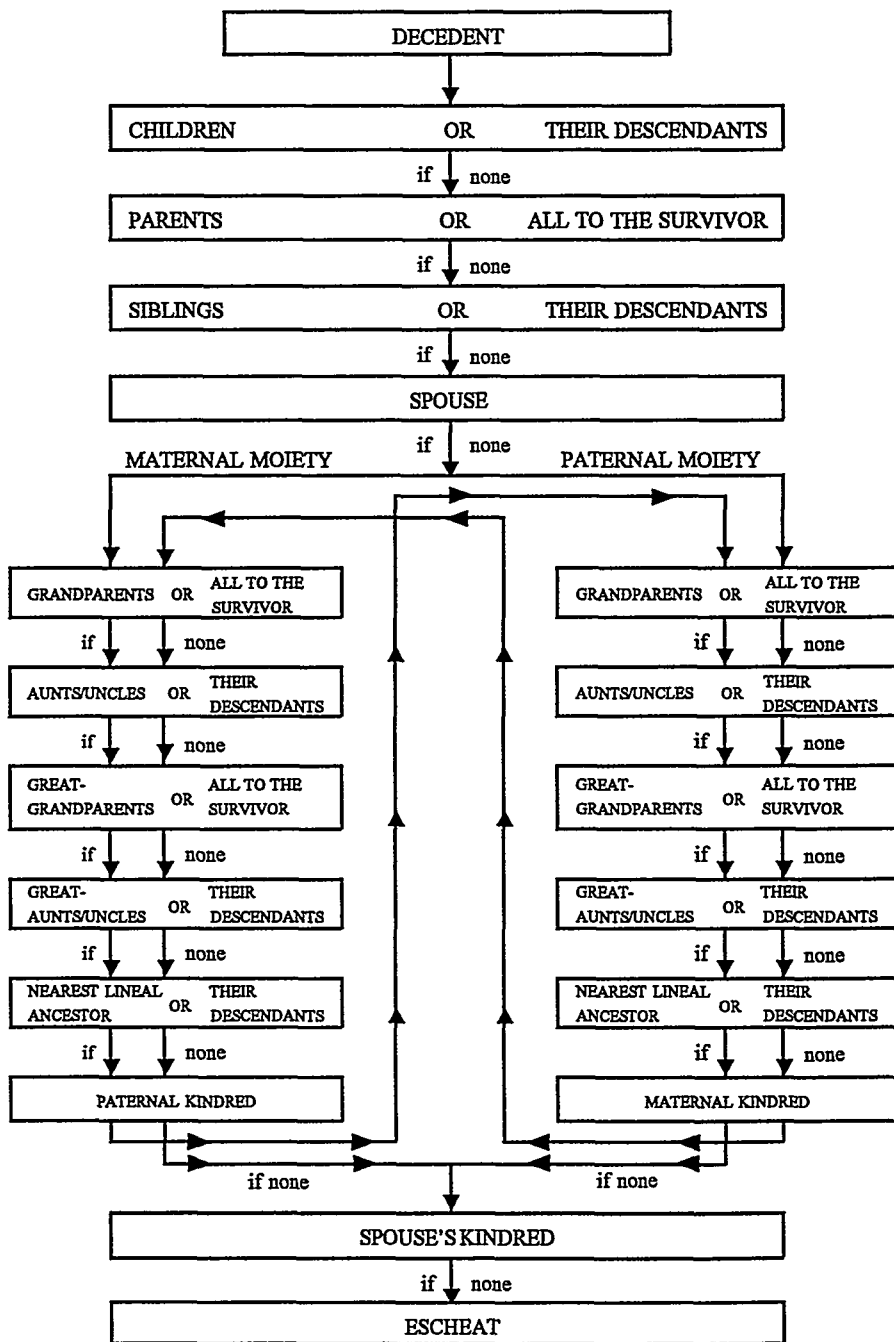
<sup>98</sup> *Id.* § 391.030(1).

<sup>99</sup> See *id.* § 391.010.

<sup>100</sup> *Id.* § 381.130 (allowing a joint tenancy to be created only by expressly providing for a right of survivorship in the instrument creating the interest).

<sup>101</sup> *Id.* § 391.120.

FIGURE 1



## A. *Shares of Intestate Takers*

### 1. *Share of Issue*

The first class of takers of the decedent's net estate after payment of any exemptions, debts, and dower are the decedent's "children and their descendants."<sup>102</sup> If there is more than one child who survives the decedent, the children share equally. Each child becomes the sole owner of that child's respective fractional interest in the decedent's personality and inherits the decedent's realty as a tenant in common with the other children.<sup>103</sup>

Although the class description employs the conjunction "and," the statute does not authorize inheritance by the descendants of living children.<sup>104</sup> It is axiomatic that remote descendants do not compete with their own living ancestors.<sup>105</sup> Thus, if the decedent is survived by two children as well as the child of one of those children, the estate is divided equally between the decedent's two children to the exclusion of the grandchild. Grandchildren can share in the decedent's estate only if their parent predeceased the decedent.

### 2. *Share of Parents*

While land could not pass in intestacy to parents or grandparents at the common law,<sup>106</sup> Kentucky's intestacy statutes provide for the "descent" of property, both real and personal, to ascendants.<sup>107</sup> However, the statutes explicitly provide that the parent or parents of the decedent qualify as intestate takers of the decedent's net estate only if there are neither surviving children of the decedent nor descendants of those children. Before any succeeding class of intestate takers may inherit, all those in preceding classes must have predeceased the decedent.

Generally, if both parents survive the decedent, each parent takes an equal share, or moiety, of the decedent's real and personal property.<sup>108</sup> If, however, the decedent dies without issue owning real property that was

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<sup>102</sup> *Id.* § 391.010(1) (providing for descent of realty); *id.* § 391.030(1) (providing for distribution of personality).

<sup>103</sup> *Id.* § 391.010(1).

<sup>104</sup> *Id.*

<sup>105</sup> *Ryburn v. First Nat'l Bank of Mayfield*, 399 S.W.2d 313, 315 (Ky. 1965) (holding that the brother of the decedent inherited to the exclusion of that brother's child and grandchild).

<sup>106</sup> William H. Page, *Descent Per Stirpes and Per Capita*, 1946 WIS. L. REV. 3, 39.

<sup>107</sup> KY. REV. STAT. ANN. § 391.010(2) (Michie/Bobbs-Merrill 1984).

<sup>108</sup> *Young v. Smithers*, 205 S.W. 949, 950 (Ky. 1918) (defining moiety in the context of inheritance by a maternal grandmother and paternal aunt and uncle).

the gift of one parent, and both parents survive the decedent, the parent who made the gift takes the whole of that real property to the exclusion of the other parent.<sup>109</sup>

The hierarchy of intestate takers created by the Kentucky statutes places the parents ahead of the surviving spouse. If the decedent is survived by a spouse and parents, the spouse receives a personalty exemption<sup>110</sup> and the dower share provided for in KRS chapter 392. The parents take the remaining estate in intestacy.<sup>111</sup> For example, assume that the decedent's estate at death consisted of \$60,000 worth of personalty and \$30,000 worth of realty after payment of the surviving spouse's personalty exemption of \$7,500 as well as after the payment of debts, costs of administration, and funeral expenses. The surviving spouse's share is the personalty exemption (\$7,500) plus one-half of the surplus personalty (\$30,000) plus one-half of the surplus realty (\$15,000) for a total value of \$52,500.<sup>112</sup> The parents' combined share of the remainder of the estate (\$45,000) is only slightly less than the share of the surviving spouse.

The rough equality of treatment afforded the spouse and parents may not reflect the intention of a typical decedent. However, this result does keep almost half of the decedent's property within the decedent's bloodline. It has been suggested that such a result is consistent with the rationale underlying the provisions of the penal code that criminalize the act of nonsupport of parents,<sup>113</sup> but it is probably specious to suggest that Kentucky's statutory pattern of inheritance resulted from a desire to provide for the support of parents of the decedent. If the decedent is survived only by issue and parents instead of a spouse and parents, the children, or their descendants, take the entire estate to the exclusion of the parents.<sup>114</sup> The best explanation for the Kentucky pattern of intestate inheritance is that it furthers an overriding objective to keep a significant share of the decedent's property in the bloodline. The pattern established by the statutes prefers the descending bloodline, but if there are no descendants then the ascending or collateral bloodlines are substituted.

### 3. *Share of Siblings and Their Descendants*

If the decedent is not survived by children, descendants of children, or parents, the net estate after the payment of the spouse's exemption, debts, and

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<sup>109</sup> KY. REV. STAT. ANN. § 391.020 (Michie/Bobbs-Merrill 1984) (ancestral property).

<sup>110</sup> *Id.* § 391.030(1)(c) (providing for a \$7500 personalty exemption).

<sup>111</sup> *See id.* § 391.010(2).

<sup>112</sup> *Id.* § 392.020 (defining dower).

<sup>113</sup> *Id.* § 530.050 (nonsupport and flagrant nonsupport).

<sup>114</sup> *Id.* § 391.010(1).

dower, if any, passes to the decedent's "brothers and sisters and their descendants."<sup>115</sup> As in the case of inheritance by the decedent's children and their descendants, if more than one sibling survives, the siblings share equally. Also, the conjunction in the class description does not authorize inheritance by descendants of living siblings. Since remote descendants do not compete in intestacy with their own living ancestors, the only way a niece or nephew can inherit is if the parent of the niece or nephew predeceases the decedent.<sup>116</sup>

If survived by a spouse and siblings, the siblings take almost as much as the decedent's spouse. Assume a hypothetical net estate of \$60,000 in personalty and \$30,000 in realty after payment of the spouse's personalty exemption of \$7,500, debts, costs of administration, and funeral expenses.<sup>117</sup> The surviving spouse's share is \$52,500 (\$7,500 plus one-half of the surplus personalty and one-half of the surplus realty).<sup>118</sup> The siblings' combined share of the estate is \$45,000. This large sibling share does not approximate the desires of the average decedent. It also refutes any suggestion that support considerations are an operative factor in the statutory inheritance scheme. As a surviving spouse is much more likely than siblings to be financially dependent on the decedent, the inclusion of siblings in the statutory pattern of intestate inheritance before the decedent's spouse (see Figure 1) evidences Kentucky's overwhelming preference for bloodline inheritance.

#### 4. *Share of Spouse*

As long as the decedent's spouse survives the decedent, the spouse is entitled to the \$7,500 personalty exemption,<sup>119</sup> a dower share of one-half of the surplus personalty and surplus realty the decedent died owning, and a life estate in one-third of any realty that the decedent was seized of in fee simple and transferred during marriage without releasing dower.<sup>120</sup> However, the surviving spouse does not take the entire intestate estate as an heir unless the decedent was not survived by children, descendants of children, parents, siblings, or descendants of siblings.<sup>121</sup> Although not reflective of

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<sup>115</sup> *Id.* § 391.010(3).

<sup>116</sup> *Ryburn v. First Nat'l Bank of Mayfield*, 399 S.W.2d 313, 315 (Ky. 1965) (holding that the brother of the decedent inherited to the exclusion of that brother's child and grandchild).

<sup>117</sup> KY. REV. STAT. ANN. § 391.030 (Michie/Bobbs-Merrill 1984 & Supp. 1992).

<sup>118</sup> *Id.* § 392.020.

<sup>119</sup> *Id.* § 391.030(1)(c).

<sup>120</sup> *Id.* § 392.020.

<sup>121</sup> *Id.* § 391.010(4).

the intention of the average intestate spouse, this is a significant improvement in the treatment of the surviving spouse. Prior to 1956, a surviving spouse was the decedent's intestate taker only if no blood kindred, however remote, survived the decedent.<sup>122</sup>

### 5. *Share of Other Ascendant and Collateral Relatives*

If the decedent is not survived by children, descendants of children, parents, siblings, descendants of siblings, or a spouse, the estate is divided into two equal moieties.<sup>123</sup> One moiety passes to the decedent's maternal kindred, beginning first with the maternal grandparents who share equally if both are living. If one maternal grandparent has predeceased the decedent, then the entire moiety passes to the survivor.<sup>124</sup> If there are no maternal grandparents, the moiety passes to maternal aunts and uncles or their descendants;<sup>125</sup> if none, to maternal great-grandparents equally or the entire moiety to the survivor;<sup>126</sup> if none, to sisters and brothers of grandparents or their descendants; and so on, to the nearest lineal ancestors and their descendants.<sup>127</sup> The other moiety passes in the same manner to the decedent's paternal kindred.<sup>128</sup> If there are no maternal kindred, the maternal moiety passes with the paternal moiety to the paternal kindred. Conversely, the whole estate passes to the maternal kindred if there are no paternal kindred<sup>129</sup> (see Figure 1).

This pattern of intestate inheritance resembles the common law's parentelic system for the descent of land. Under both of these systems, the nearest ancestor of the decedent who is either alive or has issue living at the decedent's death takes the intestate estate. Before a claimant related to the decedent through a more remote common ancestor may take, regardless of the degree of relationship to the decedent, the entire line of the closer ancestor must be exhausted no matter how distantly related the ancestor's descendant is to the decedent.<sup>130</sup> For example, in Figure 2 the Decedent is survived by

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<sup>122</sup> Compare KY. REV. STAT. ANN. § 391.010(5) (Baldwin 1955) (repealed 1956) (surviving spouse is intestate taker only if there is neither paternal nor maternal kindred) with KY. REV. STAT. ANN. § 391.010(4) (Baldwin 1956) (surviving spouse is intestate taker after children, parents, or brothers and sisters).

<sup>123</sup> KY. REV. STAT. ANN. § 391.010(5) (Michie/Bobbs-Merrill 1984).

<sup>124</sup> *Id.* § 391.010(5)(a).

<sup>125</sup> *Id.* § 391.010(5)(b).

<sup>126</sup> *Id.* § 391.010(5)(c).

<sup>127</sup> *Id.* § 391.010(5)(d).

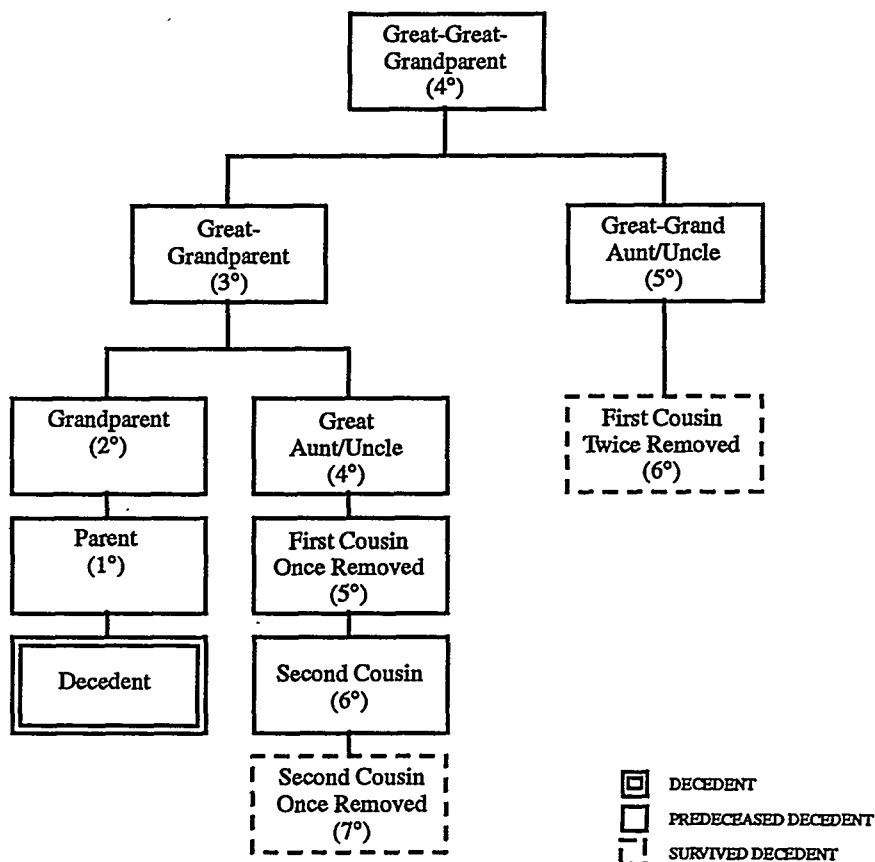
<sup>128</sup> *Id.* § 391.010(5).

<sup>129</sup> *Id.* § 391.010(6).

<sup>130</sup> W.D. Rollison, *Principles of the Law of Succession to Intestate Property*, 11 NOTRE DAME L. REV. 14, 25-27 (1935-36).

a Second Cousin Once Removed and a First Cousin Twice Removed. Even though the Second Cousin Twice Removed stands in the seventh degree of relationship to the Decedent while the First Cousin Twice Removed stands in the closer sixth degree of relationship, the Second Cousin Once Removed takes the entire moiety. The Second Cousin Once Removed is related to the Decedent as a descendant of a closer ancestor (Great-Grandparent) than is the First Cousin Twice Removed, who is related to the Decedent as a descendant of a more remote ancestor (Great-Great-Grandparent).

FIGURE 2



More typically today, intestacy statutes explicitly identify certain close relatives (e.g., children, parents, grandparents) and their issue as the intestate

takers.<sup>131</sup> If the decedent is not survived by any of these named classes of takers or their issue, the statutes then provide that the estate passes to those surviving relatives who stand in the nearest degree of relationship to the decedent. Under this type of statute, it is necessary to count degrees of kinship to determine the identity of those in the nearest degree of kinship. The Kentucky statutes avoid the need to count degrees of kinship by providing for universal representation.<sup>132</sup>

### 6. *Share of Spouse's Kindred*

If the decedent dies without a surviving spouse or any descending, ascending, or collateral relatives, the whole of the decedent's estate passes to the kindred of the decedent's spouse as if the spouse had survived the intestate and died entitled to the estate.<sup>133</sup> For example, in *Davis' Administrator v. Chasteen*<sup>134</sup> two sisters and some nieces and nephews of the decedent's predeceased husband inherited the decedent's intestate estate. These relatives of the husband took because the intestate had died without kindred of any degree and because they were the intestate takers of the predeceased husband of the decedent.<sup>135</sup>

To establish their right to inherit, kindred of the decedent's spouse must overcome the presumption that every deceased person leaves heirs capable of inheriting.<sup>136</sup> The claimant cannot sustain this burden by merely establishing the weakness of some other person's claim to the decedent's estate. Even if one claimant could prove that another claimant was an imposter, that fact alone would not establish the former's right to inherit. One claiming through the decedent's spouse still has to prove that the decedent was survived neither by a spouse nor by *any* blood kindred.<sup>137</sup>

Similarly, unsupported allegations by such a claimant that the decedent died without heirs is not sufficient to overcome the presumption that the

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<sup>131</sup> E.g., ALA. CODE § 43-8-42 (1992); IDAHO CODE § 15-2-103 (1993).

<sup>132</sup> See *infra* notes 151-56 and accompanying text.

<sup>133</sup> KY. REV. STAT. ANN. § 391.010(6).

<sup>134</sup> 273 S.W.2d 368 (Ky. 1954).

<sup>135</sup> *Id.* at 369.

<sup>136</sup> *Doeker v. McKnight*, 264 S.W.2d 78, 80 (Ky. 1954) (finding that the intestate's widow was the only heir at law of her deceased husband under prior law by establishing that the intestate had no kindred of any degree of relationship); *Montz v. Schwabacher*, 83 S.W. 569, 570 (Ky. 1904) (holding that the purchaser in a mortgage foreclosure proceeding was not required to take title because it had not been judicially established that the mortgagor died without heirs).

<sup>137</sup> *Hagedorn v. Reiser*, 221 S.W.2d 633 (Ky. 1949) (finding that the sister of the deceased wife of the intestate was an unsuccessful claimant for the intestate's property).



decendent died survived by blood heirs.<sup>138</sup> Rebutting the presumption of heirship is difficult because lack of heirship requires proof of a negative proposition. It is further complicated by the realities of the availability of any proof. Therefore, both direct and indirect evidence of the nonexistence of heirs is admissible.<sup>139</sup> Direct evidence may even take the form of family history testimony. Such evidence, though based on hearsay, is a recognized exception to the hearsay rule<sup>140</sup> and is often the best and only evidence obtainable. An example of indirect proof of the absence of heirs that can overcome the presumption of heirship is a lapse of time after the decedent's death coupled with the nonappearance of any heirs.<sup>141</sup> An unsuccessful, but diligent, search for heirs is also indirect proof that the decedent died without heirs.<sup>142</sup>

The claimant in *Doeker v. McKnight*<sup>143</sup> proffered indirect evidence that she had treated the real property of her deceased husband as her own for fifteen years after his death without any dispute as to her right to the property.<sup>144</sup> The warning order attorney appointed to notify the decedent's heirs of the pendency of the action was unable to locate any heirs. That fact was additional indirect, but competent, evidence tending to establish the absence of heirs. Direct evidence of the nonexistence of heirs was provided by two long-time neighbors of the decedent and a colleague from the decedent's place of employment. They testified that the decedent had always referred to himself as an orphan and had often stated that he had no living relatives in this country or in his country of birth. No witnesses or other evidence was submitted to controvert the claimant's proof. The claimant could have carried her burden either by proof of a lapse of time accompanied by the nonappearance of heirs or by direct evidence of the nonexistence of heirs.<sup>145</sup> The combination of direct and indirect proof in *Doeker* was sufficient to overcome the presumption of heirship.

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<sup>138</sup> *Montz*, 83 S.W. at 570.

<sup>139</sup> *Doeker*, 264 S.W.2d at 79-80.

<sup>140</sup> *Ellis v. Dixon*, 172 S.W.2d 461, 461 (Ky. 1943) (holding that the trial court incorrectly excluded pedigree declarations offered by those claiming to be heirs of the intestate).

<sup>141</sup> Compare *Doeker*, 264 S.W.2d at 80 (finding a lapse of fifteen years to be sufficient evidence of lack of heirship) with *Montz*, 83 S.W. at 570 (finding a lapse of five years to be insufficient evidence of lack of heirship).

<sup>142</sup> *Newport Nat'l Bank v. Fick*, 294 S.W.2d 521, 522 (Ky. 1956) (unsuccessful search for heirs by a probate genealogist); *Davis' Adm'r v. Chasteen*, 273 S.W.2d 368, 369 (Ky. 1954) (unsuccessful search for heirs by a warning order attorney).

<sup>143</sup> 264 S.W.2d 78 (Ky. 1954).

<sup>144</sup> *Id.* at 80.

<sup>145</sup> *Id.*

*Newport National Bank v. Fick*<sup>146</sup> also involved a combination of direct and indirect evidence that was sufficient to overcome the presumption of heirship. The original claimant was the brother of the decedent's deceased husband and claimed to be the deceased husband's sole heir. The claimant died after the commencement of the action and his widow continued to prosecute the suit in her capacity as the sole devisee under her husband's will. The claimant hired a probate geneologist to locate any heirs of the intestate. The geneologist's opinion, predicated on a diligent search and the death certificates of the decedent's mother and three siblings, was that the decedent had no heirs other than those who would take through the decedent's predeceased spouse. An attorney for the husband of the decedent and a nephew of the decedent's husband offered uncontroverted testimony that the decedent and her husband had no issue; that the decedent was predeceased by her parents and her siblings; and that the sibling of the decedent who had married never had issue. Although the claimant never established whether the decedent ever had other kin or what happened to them, the witnesses testified that the decedent did not have surviving kindred of any degree. The evidence submitted by the claimant in this case was incomplete; nonetheless, the court found that, in light of the realities with respect to the availability of proof in such an action, the claimant had sustained her burden.<sup>147</sup>

### B. Representation

Sometimes a person who would have inherited from the decedent had the person survived the decedent dies too soon. The principle of representation substitutes the lineal descendants of the deceased person for the predeceased heir apparent.<sup>148</sup> The English statutes of distribution did not permit the use of representation beyond the children of sisters and brothers,<sup>149</sup> and many contemporary intestacy systems continue to restrict representation to the nearer degrees of relationship.<sup>150</sup>

Kentucky's intestacy scheme embodies the principle of universal representation. When any member of the class first entitled to inherit in intestacy dies before the decedent, any descendants of that member who survive the decedent take the share of the deceased member.<sup>151</sup> Representation is used when the intestate takers are "children and their descendants,"<sup>152</sup> "brothers and sisters and their descen-

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<sup>146</sup> 294 S.W.2d 521 (Ky. 1956).

<sup>147</sup> *Id.* at 522.

<sup>148</sup> Page, *supra* note 106, at 3.

<sup>149</sup> *Id.* at 43.

<sup>150</sup> E.g., OHIO REV. CODE ANN. § 2105.11-13 (Baldwin 1993).

<sup>151</sup> KY. REV. STAT. ANN. § 391.040 (Michie/Bobbs-Merrill 1984).

<sup>152</sup> *Id.* § 391.010(1).

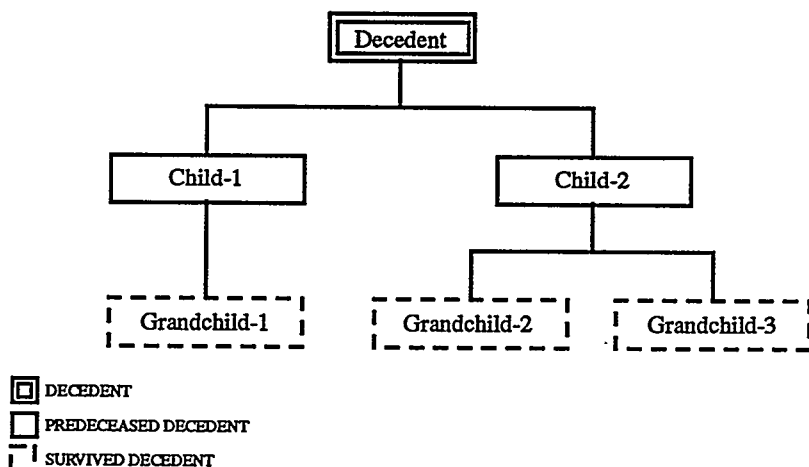
dants,"<sup>153</sup> "uncles and aunts and their descendants,"<sup>154</sup> "brothers and sisters of the grandfathers and grandmothers and their descendants,"<sup>155</sup> or "other lineal ancestors and their descendants."<sup>156</sup>

Representation creates a subsidiary problem of whether the lineal descendants of the heir apparent who died before the decedent take "per capita" or "per stirpes." Per capita distribution means distribution "by head," or equal shares to all the heirs.<sup>157</sup> It is available as a method of intestate distribution only if all the heirs stand in the same degree of relationship to the decedent.<sup>158</sup> Per stirpes distribution is taking "by stock" and not as individuals.<sup>159</sup> It is not limited in its availability to those situations in which all the heirs are in the same degree of relationship. The two methods of distribution can produce different results.

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FIGURE 3

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<sup>153</sup> *Id.* § 391.010(3).

<sup>154</sup> *Id.* § 391.010(5)(b).

<sup>155</sup> *Id.* § 391.010(5)(d).

<sup>156</sup> *Id.*

<sup>157</sup> *Wagner v. Wagner*, 197 S.W.2d 86, 89 (Ky. 1946) (finding that will provision to "divide my property between A, B, and C" required a per capita distribution even though A was the testator's child and B and C were the children of a predeceased child of the testator).

<sup>158</sup> Page, *supra* note 106, at 6.

<sup>159</sup> *Wagner*, 197 S.W.2d at 89.

In Figure 3 all of the heirs are in the same degree of relationship to the decedent (grandchildren). Therefore, distribution per capita as well as distribution per stirpes can be used. Under a per capita distribution scheme, each of the three grandchildren, *GC1*, *GC2*, and *GC3*, take one-third of the decedent's estate. Orthodox per stirpes distribution, in contrast, requires the equal division of the decedent's property among the stocks of descent. The stock is determined at the generational level originally closest to the intestate. In Figure 3 each person in the generation of heirs originally nearest the decedent who survived the decedent or who left descendants who survived the decedent is counted as one stock of descent. Because both *C1* and *C2*, the heirs originally nearest the decedent, left descendants who survived the decedent, *D*'s property is divided equally between the two stocks of descent. Grandchild *GC1* will take the half of the estate its parent *C1* would have taken if *C1* had survived *D*. Grandchildren *GC2* and *GC3*, the two children of *C2*, will take their parent's half of the estate equally.<sup>160</sup> Thus, *GC2* and *GC3* will each take a half of a half, or a quarter, of *D*'s estate.

Kentucky uses the orthodox per stirpes system.<sup>161</sup> Many other jurisdictions, however, employ a modified form of per stirpes distribution.<sup>162</sup> In those jurisdictions the number of stocks of descent for representation purposes is determined at the first generation in which there are both class members who survived the decedent and class members who did not survive the decedent but who left descendants who did. Kentucky uses per stirpes in the original meaning of the term. The number of stocks of descent are always determined at the first generational level of class members whether any, or all, of the members of that class are dead.<sup>163</sup> Figure 4 will be used to illustrate the difference in the two meanings of per stirpes distribution.

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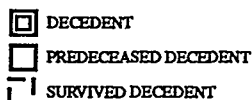
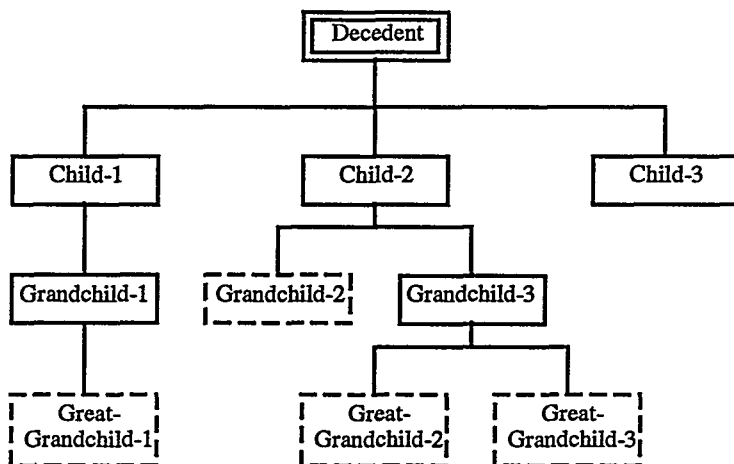
<sup>160</sup> *Martin v. Hull*, 180 S.W.2d 390 (Ky. 1944) (holding that the two surviving children of the intestate each took one-third of the estate while the remaining one-third was divided equally between the four children of the intestate's predeceased daughter).

<sup>161</sup> See KY. REV. STAT. ANN. § 391.040 (Michie/Bobbs-Merrill 1984).

<sup>162</sup> E.g., UNIF. PROBATE CODE § 2-106, 8 U.L.A. 64 (1987 & Supp. 1990).

<sup>163</sup> KY. REV. STAT. ANN. § 391.040 (Michie/Bobbs-Merrill 1984) (descendants of distributees take per stirpes); *Kentucky Trust Co. v. Sweeney*, 163 F. Supp. 450, 452 (W.D. Ky. 1958) (dividing the estate, at the death of the life tenant of a testamentary trust, into stocks according to the number of siblings the decedent had had even though none of the siblings survived).

FIGURE 4



Under the modified meaning of per stirpes, the number of stocks of descent is determined at the grandchild level because it is the first generational level where there are class members who survived the decedent and class members who did not survive but who left descendants who did. As grandchild *GC2* survived *D* and both grandchildren *GC1* and *GC3* did not, but left descendants who did, the estate is divided into three stocks of descent. Great-grandchild *GGC1* takes the one-third of the estate that her parent *GC1* would have taken had *GC1* survived *D*. Grandchild *GC2* takes one-third of the estate because *GC2* survived *D*. The one-third of the estate attributable to *GC3* is divided equally between great-grandchildren

*GGC2* and *GGC3* with each taking a half of a third, or one-sixth, of *D*'s estate.

Under Kentucky's definition of per stirpes distribution, the estate in Figure 4 is divided into as many stocks of descent as there are children—the first generation of class members—who survived *D* and children who predeceased *D* but who left descendants who survived *D*. Although *D* had three children, the estate is divided into only two stocks of descent because only children *C1* and *C2* left descendants who survived *D*. Great-grandchild *GGC1* takes the half of the estate that her grandparent *C1* would have taken had *C1* survived *D*. Because grandchildren *GC2* and *GC3* would have shared their parent's half of the estate equally if *GC3* had survived *D*, grandchild *GC2* takes one-half of that half, or a quarter, of *D*'s estate. Predeceased grandchild *GC3*'s one-quarter share is divided equally between great-grandchild *GGC2* and *GGC3*. Each of them will inherit one-eighth of *D*'s estate.

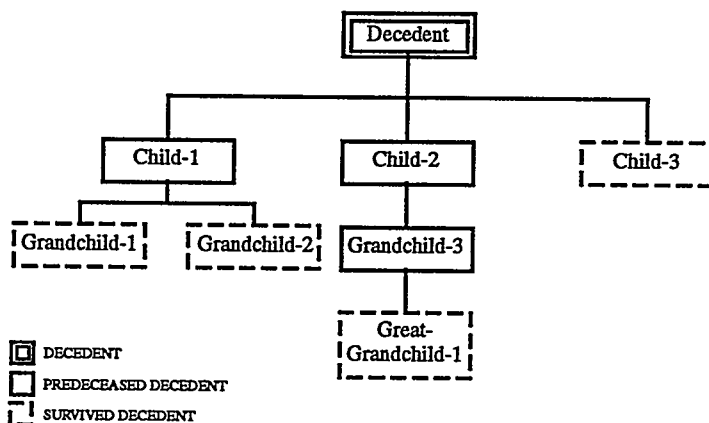
Kentucky's insistence upon the use of per stirpes distribution in its original meaning, or pure form, does violence to the widely accepted idea that if the decedent's heirs are related to the decedent in equal degree, they should inherit equal portions of the decedent's estate.<sup>164</sup> In Figure 3 all of the grandchildren stand in the same degree of relationship to the decedent. Presumably, a person has the same affection for one grandchild as another. Yet, grandchild *GC1* takes one-half of the estate in Kentucky, while grandchildren *GC2* and *GC3* each take one-quarter shares. Pure per stirpes distribution also creates the anomalous results of Figure 4. Grandchild *GC1*, the intestate taker who stands in the closest degree of relationship to the decedent, takes less (one-fourth of the estate) than the more remote taker, great-grandchild *GGC1* (one-half of the estate).

The modified interpretation of per stirpes distribution seeks to prevent closer descendants from taking less than more remote descendants of the decedent. It also seeks to treat all those takers in the same degree of relationship to the decedent equally.

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<sup>164</sup> See, e.g., MCGOVERN ET AL., *supra* note 7, § 1.3; UNIF. PROBATE CODE § 2-103, 8 U.L.A. 60 (1987).

FIGURE 5



The modified interpretation of per stirpes does not, however, always produce the desired results. In Figure 5 both Kentucky's pure per stirpes and the modified form of per stirpes distribution determine the stocks of descent at the generational level nearest the decedent. Kentucky always determines the number of stocks of descent at the first generational level of the class. The modified per stirpes formula also uses the first generational level under these facts because it is the first level in which there are class members who survived *D* and class members who did not survive *D* but who left descendants who did survive. As there are three stocks of descent under either meaning assigned to the term per stirpes, child *C3*, who stands in the nearest degree of relationship to *D*, takes one-third of the estate as does great-grandchild *GGC1*, who stands in the most remote degree of relationship to *D*. Grandchildren *GC1* and *GC2*, who are more closely related to *D* than great-grandchild *GGC1*, take only one-sixth of the estate as the descendants of child *C1*.

Another method of representation that would prevent those who are more remotely related to the decedent from ever taking more than those who are more closely related to the decedent is called "per

capita at each generation."<sup>165</sup> This method, which has been adopted in North Carolina,<sup>166</sup> has the additional advantage of treating all those class members of the same degree of relationship to the decedent equally. For example, at the first level in Figure 5 where there are living takers (the children level), the estate is divided into as many shares as there are takers who survived *D* (one) and would-be takers who didn't survive *D* but who left descendants who did (two). Child *C3* takes one-third of the estate, leaving two-thirds of the estate to be distributed. At the next generational level in Figure 5 (the grandchild level), there are two grandchildren, *GC1* and *GC2*, who survived *D* as well as one grandchild, *GC3*, who did not but who left descendants who did survive. Therefore, the remaining two-thirds of the estate is divided into three shares. Grandchild *GC1* takes one-third of the remaining two-thirds of the estate, or two-ninths, as does grandchild *GC2*. Because grandchild *GC3* did not survive *D*, there are two-ninths of the estate left to be distributed at the great-grandchild level. Only one person, great-grandchild *GGC1*, exists at that level; consequently, that great-grandchild takes the remaining two-ninths of *D*'s estate.

### C. Degrees of Relationship

Many jurisdictions designate certain expressly named relatives such as children, parents, siblings, and spouse as the decedent's intestate takers.<sup>167</sup> In the absence of any named takers within this inner circle of relatives, the property passes to the decedent's surviving relative who stands in the closest degree of relationship to the decedent.<sup>168</sup> If two or more relatives are in the closest degree of relationship to the decedent, these relatives share the estate equally.

Two methods exist for computing the degree of relationship of the claimant to the decedent: the civil law method and the canon law method.<sup>169</sup> The former method of computation is more widely accepted

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<sup>165</sup> N.C. GEN. STAT. §§ 29-15, 29-16 (1992); see also ME. REV. STAT. ANN. tit. 18-A, §§ 2-103, 2-106 (West 1964) (adopting similar provisions).

<sup>166</sup> Lawrence W. Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U. L. REV. 626, 630 (1971) (citing William L. Eagleton, *Introduction to the Intestacy Act and the Dower Rights Act*, 20 IOWA L. REV. 241, 244, 247-49 (1935)).

<sup>167</sup> E.g., OHIO REV. CODE ANN. § 2105.11-.13 (Baldwin 1993).

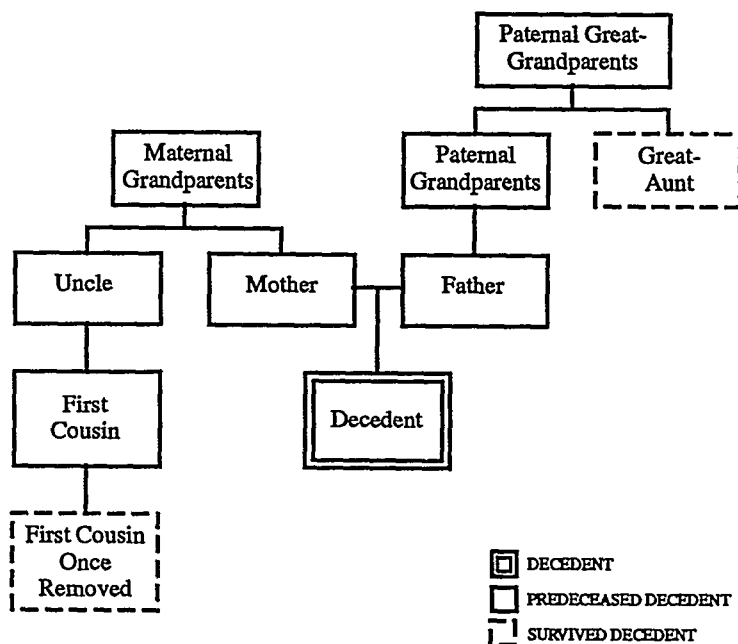
<sup>168</sup> *Id.*

<sup>169</sup> ATKINSON, *supra* note 3, at 44-49.



than the latter.<sup>170</sup> Under the civil law system, a person's degree of relationship to the decedent is the sum of the number of generational steps from the decedent up to the closest common ancestor of the decedent and the claimant plus the number of generational steps down from that common ancestor to the claimant.<sup>171</sup> The canon law methodology also involves the counting of the generational steps from the decedent up to the common ancestor and then down from the common ancestor to the claimant. However, under the canon law method, the claimant's degree of relationship is not the sum of these generational steps, but is the number of generational steps in the longer of the ascending or descending lines.<sup>172</sup> Regardless of which method is employed, the claimant with the lowest numerical degree of relationship would inherit the decedent's property.

FIGURE 6



<sup>170</sup> *Id.* at 45.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

In Figure 6 the Decedent was survived by a paternal Great-Aunt and a maternal First Cousin Once Removed. Using the civil law computation method,<sup>173</sup> the Great-Aunt stands in the fourth degree of relationship to the Decedent. There are three generational steps from the Decedent to the paternal Great-Grandparents (the ancestors who are common to the Decedent and the paternal Great-Aunt), plus one generational step down from the common ancestor to the Great-Aunt. Using the same method, the First Cousin Once Removed stands in the fifth degree of relationship to the Decedent. As the maternal Great-Aunt stands in the fourth degree of relationship and the paternal First Cousin Once Removed stands in the fifth degree, the Great-Aunt would inherit all of the Decedent's estate.

The results are different under the canon law method of computation. There are still three generational steps in the ascending line from the Decedent to the common ancestor as well as one generational step in the descending line from the common ancestor to the Great-Aunt. In this case the number of generational steps in the ascending line is the relevant degree of relationship because it is the longer line. Therefore, the Great-Aunt stands in the third degree of relationship to the Decedent. On the maternal side, there are two generational steps from the Decedent to the common ancestors (the Grandparents) and three generational steps from the Grandparents to the First Cousin Once Removed. Because the number of generational steps in the longer line determines the degree of relationship, the First Cousin Once Removed is in the third degree of relationship to the Decedent. As both claimants are equally related to the Decedent, the maternal First Cousin Once Removed would share the Decedent's estate equally with the paternal Great-Aunt.

In Kentucky, the degree of relationship between the claimant and the decedent does not determine the identity of the decedent's intestate takers. Rather, Kentucky uses a modified parentelic system of intestate inheritance.<sup>174</sup> If the expressly named relatives do not survive the decedent, the property passes to the nearest lineal ancestors and their descendants.<sup>175</sup>

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<sup>173</sup> See Appendix for detailed chart of Civil Law Degrees of Relationships.

<sup>174</sup> KY. REV. STAT. ANN. § 391.010 (Michie/Bobbs-Merrill 1984).

<sup>175</sup> *Id.* Degrees of relationship are important in Kentucky, however, as a ground for disqualifying a judge. Any judge or master commissioner must be disqualified in any proceeding where the judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, is a party, lawyer, material witness, or one who is financially interested in the outcome of the proceeding. *Id.* § 26A.015(2)(d) (1992). For purposes of this statutory provision, the Attorney General has held that the legislature intended to adopt the civil law method of computing the degree of relationship. Op. Ky. Att'y Gen. 77-232 (1977).

### III. STATUS AFFECTING INHERITANCE RIGHTS

The rules of intestate inheritance at the common law contained numerous proscriptions against inheritance by certain categories of claimants. For instance, a child born out of wedlock could inherit neither land nor personalty from either decedent parent.<sup>176</sup> Although half-blood relatives could inherit personalty,<sup>177</sup> they had no claim to the decedent's realty.<sup>178</sup> Moreover, since adoption was not recognized at the common law,<sup>179</sup> inheritance rights of adoptees were never an issue. Although citizens of friendly foreign countries could inherit in intestacy, their rights were limited to succession to personalty, with no right to claim a share of the decedent's land.<sup>180</sup> Such common law limitations on intestate inheritance did not remain static, however. The history of intestate succession in England, the United States, and Kentucky is one of gradual, but uneven, elimination of status impediments to intestate inheritance.

#### A. *Posthumous Heirs*

A posthumous heir in Kentucky is an heir of the decedent who was not alive at the decedent's death, but who was born of a widow within ten months after the death of the intestate.<sup>181</sup> Such a child inherits from the

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In one case, the court disqualified a judge because one of the attorneys was the judge's brother-in-law (that is, the attorney's wife was the judge's wife's sister). *Middle States Coal Co. v. Hicks*, 608 S.W.2d 56 (Ky. 1980) (invalidating Op. Ky. Att'y Gen. 77-286, which determined that a brother-in-law of a judge was not within the third degree of relationship to the judge and was not considered the spouse of someone within that degree of relationship). A first cousin by consanguinity or affinity stands in the fourth degree of relationship to the decedent and is not within the degrees of relationship enumerated in the statute. See KY. REV. STAT. ANN. § 26A.015(2)(d) (Michie/Bobbs-Merrill 1992) (referring only to the third degree of relationship). Nonetheless, on at least two occasions, Kentucky's highest court has disqualified a judge thus related to one of the parties in order to avoid appearances of impropriety. *Barnes v. Cooper*, 507 S.W.2d 157, 160 (Ky. 1974) (judge's spouse was a first cousin to the spouse of the defendant); *Wells v. Walter*, 501 S.W.2d 259, 259 (Ky. 1973) (judge's spouse was a first cousin of the husband in a divorce action).

<sup>176</sup> DUKEMINIER & JOHANSON, *supra* note 4, at 99-101.

<sup>177</sup> MCGOVERN ET AL., *supra* note 7, § 1.3, at 16 (citing 2 W. BLACKSTONE, COMMENTARIES 505 (1765)).

<sup>178</sup> *Id.* (citing 2 W. BLACKSTONE, COMMENTARIES 224 (1765)).

<sup>179</sup> *Id.* § 2.2, at 46.

<sup>180</sup> ATKINSON, *supra* note 3, at 53-54.

<sup>181</sup> KY. REV. STAT. ANN. § 391.070 (Michie/Bobbs-Merrill 1984) (inheritance by a posthumous child).

decedent "in the same manner as if [the child] were in being at the time of the intestate's death."<sup>182</sup> For example, in *Sansberry's Executor v. McElroy*<sup>183</sup> the testator did not dispose of the reversion following a life estate that he had created in his will in favor of his wife. Therefore, the reversion passed by the laws of intestacy. Several months after the death of the testator, his widow gave birth to a child. This posthumous child shared equally in the reversion with the testator's children who had been alive at the testator's death.<sup>184</sup>

Given the ten-month gestation period incorporated into the statutes, an issue of the legitimacy of a posthumous child may arise. A child born during lawful wedlock or within ten months thereafter is presumed, by statute, to be the child of the spouses.<sup>185</sup> However, evidence showing "that the marital relationship between the husband and wife ceased ten (10) months prior to the birth of the child" can overcome this presumption.<sup>186</sup> Only one reported case raises the issue of whether the claimant was the posthumous child of the decedent.<sup>187</sup> In that case, the child was born nine months after his mother moved out of the home of her husband, the decedent, and seven months after the decedent died.<sup>188</sup> The court held against the claimant because the evidence established that the decedent had suffered from Bright's disease, which made him incapable of sexual intercourse for the twelve-month period prior to the birth of the claimant.<sup>189</sup>

If a claimant is a rightful posthumous heir of the decedent, a judicial proceeding after the decedent's death to which the posthumous child was not a party cannot take away the heir's interest in the decedent's estate.<sup>190</sup> This is true regardless of whether the judicial proceeding

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<sup>182</sup> *Id.*

<sup>183</sup> 69 Ky. (6 Bush) 440 (1869).

<sup>184</sup> *Id.* at 441-42.

<sup>185</sup> KY. REV. STAT. ANN. § 406.011 (Michie/Bobbs-Merrill 1984) (presumption of paternity).

<sup>186</sup> *Id.*; see also *Bartlett v. Commonwealth*, 705 S.W.2d 470, 472-73 (Ky. 1986) (holding that human leukocyte antigens (HLA) blood testing is sufficient evidence to rebut the presumption that the husband is the father of a child born during the marriage).

<sup>187</sup> *Goss v. Froman*, 12 S.W. 387 (Ky. 1889).

<sup>188</sup> *Id.* at 387.

<sup>189</sup> *Id.* at 388-89.

<sup>190</sup> *Cole v. Lewis*, 169 S.W. 490, 492 (Ky. 1914) (holding that the judgment and sale of decedent's land, which occurred after decedent's death but prior to the posthumous heir's birth, did not deprive the posthumous heir of her interest in the land); *Massie v. Hiatt's Adm'r*, 82 Ky. Op. 314, 318-20 (1884) (holding that a judicial sale of decedent's land, which occurred after the decedent's death and after the birth of the posthumous child, did not deprive the posthumous child of her interest, as she was not a party to the

purporting to dispose of the land in which the posthumous heir has an interest occurred before or after the birth of the posthumous heir.<sup>191</sup> The posthumous heir may even recover against a remote grantee as well as against the original purchaser of the intestate's land at a judicial sale of the intestate's property.<sup>192</sup> Additionally, the posthumous heir's interest in the estate of the decedent passes upon the subsequent death of the posthumous heir as an asset of the heir's estate.<sup>193</sup>

Although all of the Kentucky cases involve a posthumous child of the decedent, the statutory language authorizes inheritance by posthumous collateral relatives as well.<sup>194</sup> Thus, if the decedent dies survived by only a sibling and the pregnant widow of a sibling who predeceased the decedent, the later-born niece or nephew shares equally in the decedent's estate with the surviving sibling.

### B. *Adopted Heirs*

Because adoption was not recognized at the common law,<sup>195</sup> the right of adoption in Kentucky is purely statutory.<sup>196</sup> In order for an adoptee to qualify for inheritance as the child of the adopting parent, strict compliance with the terms of the adoption statutes is essential.<sup>197</sup> For example, in one case, the court denied the allegedly adopted daughter of the decedent any inheritance rights in her adoptive parent's estate because the order of adoption was entered in county court instead of in circuit court as required by the statutes in effect at the time of the adoption.<sup>198</sup> The court refused to recognize a "de facto" adoption of the

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sale).

<sup>191</sup> Compare *Cole*, 169 S.W. at 491 (child born after judgment and sale of land), with *Massie*, 82 Ky. Op. at 316 (child born before judicial sale of land).

<sup>192</sup> See *Massie*, 82 Ky. Op. at 319.

<sup>193</sup> *Sansberry's Ex'r v. McElroy*, 69 Ky. (6 Bush) 440, 441-42 (1869) (holding that a posthumous child's reversionary interest passed under the statutes of descent and distribution at the child's death, which occurred while the life tenant was still alive).

<sup>194</sup> KY. REV. STAT. ANN. § 391.070 (Michie/Bobbs-Merrill 1984) (referring to a child born "of a widow," not of the decedent's widow).

<sup>195</sup> See *supra* note 179.

<sup>196</sup> *Profitt v. Evans*, 433 S.W.2d 876, 877 (Ky. 1968) (holding that the claimant was not properly adopted because the order of adoption was entered in the wrong court; therefore, the claimant could not inherit from her adoptive mother).

<sup>197</sup> *Carter v. Capshaw*, 60 S.W.2d 959, 963 (Ky. 1933) (holding that the claimant was not properly adopted because the wife of the adopting parent did not join in the petition for adoption).

<sup>198</sup> *Profitt*, 433 S.W.2d at 876.

claimant by the decedent<sup>199</sup> even though the defective adoption proceeding occurred more than fifty years earlier when the claimant was three years old and even though there was ample evidence that the decedent had treated the claimant as her child for all those years.<sup>200</sup>

If the claimant acquires the status of adopted child in another jurisdiction, Kentucky recognizes the adoption unless the status so created or the rights flowing from the adoption are repugnant to the public policy of Kentucky.<sup>201</sup> The application of this principle in a noninheritance case led to a finding that even though Kentucky law does not provide for equitable adoption,<sup>202</sup> an equitably adopted child was entitled to a child's insurance benefits under the Social Security Act.<sup>203</sup> The equitable adoption of the claimant had been accomplished in Ohio when the parent and child were Ohio domiciliaries.<sup>204</sup> The subsequent change of their domicile to Kentucky did not destroy the adopted status the claimant attained in Ohio.<sup>205</sup>

Although the law of the forum of the adoption determines the status of an adopted child,<sup>206</sup> the law of the state in which the real property of the decedent is located and the law of the decedent's domicile for personalty govern the inheritance rights of an adopted heir.<sup>207</sup> In one case, the Kentucky courts did not permit a child who was adopted under New York law to inherit in intestacy from the child's natural, paternal great-uncle.<sup>208</sup> The New York adoption was valid in Kentucky, but New York's intestacy law, which preserved the right of adopted children to inherit from and through their birth parents, was not applicable.<sup>209</sup> The great-uncle's domicile at death and the location of his assets was Kentucky; therefore, Kentucky's intestacy statutes, which "cut off" the adopted child's right to inherit from his birth family, controlled.<sup>210</sup>

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<sup>199</sup> *Id.* at 877.

<sup>200</sup> *Id.*

<sup>201</sup> *Edmands v. Tice*, 324 S.W.2d 491, 492 (Ky. 1958), *overruled on different grounds* by *Wilson v. Johnson*, 389 S.W.2d 634 (Ky. 1965) (recognizing the validity of a Washington adoption); *Pyle v. Fischer*, 128 S.W.2d 726, 727 (Ky. 1939) (recognizing the validity of an Indiana adoption); *Moore v. Smith*, 14 S.W.2d 1072, 1074-75 (Ky. 1929) (recognizing the validity of a Colorado adoption).

<sup>202</sup> *McGOVERN ET AL.*, *supra* note 7, § 2.2 (defining and discussing equitable adoption).

<sup>203</sup> *Rader v. Celebrezze*, 253 F. Supp. 325, 329-30 (E.D. Ky. 1966).

<sup>204</sup> *Id.* at 326.

<sup>205</sup> *Id.* at 330.

<sup>206</sup> *Arcerio v. Hager*, 397 S.W.2d 50, 51 (Ky. 1965), *overruled on different grounds* by *Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989).

<sup>207</sup> *Id.* at 52; *see supra* part I.B.

<sup>208</sup> *Arcerio*, 397 S.W.2d at 52-54.

<sup>209</sup> *Id.* at 52.

<sup>210</sup> *Id.*

Since the enactment of the first general adoption statute in Kentucky in 1860,<sup>211</sup> the inheritance rights of adopted heirs have been subject to numerous statutory changes. The frequent changes in the adoption statutes created a question whether the adoption statutes in effect at the time of the adoption or the adoption statutes in effect at the death of the property owner fixed the adopted child's inheritance rights. In *Kolb v. Ruhl's Administrator*,<sup>212</sup> for instance, the statute under which the child was adopted did not permit an adopted child to inherit from an ancestor, a collateral relative, or a birth child of the adopting parents. Ten years after the adoption, the legislature enacted a new adoption law which removed these restrictions.<sup>213</sup> The decedent died survived only by collateral relatives—cousins and descendants of predeceased cousins—and the claimant, who was the adopted child of a predeceased cousin. The court permitted the claimant to share in the intestate distribution of the decedent's estate because it applied the general rule that the laws of succession in existence at the time of the death of the property owner determine the heirs and distributees of a person dying intestate.<sup>214</sup> Thus, the adoption statutes in effect at the decedent's death, which permitted an adopted child to inherit from the collateral relatives of its adopting parents, were controlling.<sup>215</sup>

This timing rule, however, has also worked to bar inheritance by an adopted child. In *Thornberry v. Timmons*,<sup>216</sup> the claimant's great-aunt adopted her at a time when Kentucky permitted an adopted child to inherit from both the child's birth and adopting parents. A subsequent amendment to the adoption statutes eliminated an adopted child's right to inherit from her or his birth parents after the adoption. Thereafter, when the natural, maternal grandfather of the adopted child died, the child did not inherit from him because the new statutory amendments controlled.<sup>217</sup>

For purposes of inheritance, Kentucky's present adoption statute<sup>218</sup> places the adopted child on an equal footing with a birth child of the adopting

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<sup>211</sup> 1860 Ky. Acts ch. 741, §§ 1-3.

<sup>212</sup> 198 S.W.2d 326 (Ky. 1946).

<sup>213</sup> *Id.* at 327.

<sup>214</sup> *Id.* at 328-29.

<sup>215</sup> *Id.* But see *Kentucky Trust Co. v. Sweeney*, 163 F. Supp. 450, 452 (W.D. Ky. 1958) (holding that in a testamentary situation, adoption statutes in effect at the expiration of a life estate, not at the death of the testator, control); *Breckinridge v. Skillman's Trustee*, 330 S.W.2d 726, 727 (Ky. 1959); *Major v. Kammer*, 258 S.W.2d 506, 508 (Ky. 1953).

<sup>216</sup> 406 S.W.2d 151 (Ky. 1966).

<sup>217</sup> *Id.* at 152.

<sup>218</sup> KY. REV. STAT. ANN. § 199.520(2) (Michie/Bobbs-Merrill 1991).

parents.<sup>219</sup> Not only does an adopted child inherit from his or her adopting parents as their primary intestate taker, but the issue of an adopted child who predeceases the adopting parents also inherit as the adopting parent's grandchildren.<sup>220</sup> Prior statutes did not permit inheritance by the adopting parents from the adopted child.<sup>221</sup> The current statute, however, places the adopted child in the same legal status as a child born to the adopting parents and contemplates inheritance by the adopting parents from the adopted child if the child predeceases her or his adopting parents. Kentucky's earlier, more restrictive, adoption statutes also did not permit an adopted child to inherit through her or his adopting parents.<sup>222</sup> Today, because of the removal of the restrictive phraseology of the former statutes, adopted children have the same status as birth children including the right to inherit from their ancestors and collateral relatives through the adopting parents.<sup>223</sup>

The holdings of some prior cases presaged the statutory equalization of the rights of adopted children and of birth children of the adopting parents. For instance, in *Atchinson v. Atchinson's Executors*,<sup>224</sup> the surviving spouse of an adopting parent who joined in the petition of adoption shared in intestacy with the adopted child just as the surviving spouse would have if the decedent's surviving child had been a birth child.<sup>225</sup> Also, in *Lanferman v. Vanzile*,<sup>226</sup> a case in which an adopted child inherited real property from the adopting parent and then died an infant without issue, the real property had been determined to pass, and still does pass, under the ancestral property clause to the kindred of that adopting parent.<sup>227</sup> However, an earlier decision<sup>228</sup> holding that damages for the wrongful death of an adopted child belong to the birth

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<sup>219</sup> The statute provides that the adopted child "shall be considered for purposes of inheritance . . . the natural child of the parents adopting it the same as if born of their bodies." *Id.*

<sup>220</sup> *Bailey v. Wireman*, 240 S.W.2d 600, 602 (Ky. 1951); *Wilcox v. Sams*, 281 S.W. 832, 833 (Ky. 1926); *Power v. Hafley*, 4 S.W. 683, 685 (Ky. 1887).

<sup>221</sup> *Lanferman v. Vanzile*, 150 S.W. 1008, 1010 (Ky. 1912).

<sup>222</sup> *See, e.g., Woods v. Crump*, 142 S.W.2d 680, 682 (Ky. 1940) (holding that an adopted child could not inherit under a grant from the parents of the adopting parent); *Merritt v. Morton*, 136 S.W. 133, 134 (Ky. 1911) (holding that an adopted child could not inherit in intestacy from the mother of his adopting parent).

<sup>223</sup> *Kolb v. Ruhl's Adm'r*, 198 S.W.2d 326, 329 (Ky. 1946) (allowing an adopted child to inherit from the first cousin of the adopting parent).

<sup>224</sup> 12 S.W. 942 (Ky. 1890).

<sup>225</sup> *Id.* at 943-44.

<sup>226</sup> 150 S.W. 1008 (Ky. 1912).

<sup>227</sup> *Id.* at 1010-11.

<sup>228</sup> *Jackson's Adm'r v. Alexiou*, 3 S.W.2d 177 (Ky. 1928).



parents and not the adopting parents<sup>229</sup> is no longer viable under the current adoption statutes.

Kentucky's current adoption statutes significantly increase the adopted child's rights by authorizing inheritance from, through, and by the adopting parents. The statutes also expressly eliminate any right of inheritance from, through, or by the birth parents.<sup>230</sup> For instance, in *Thornberry v. Timmons*,<sup>231</sup> a child did not share in her maternal grandfather's estate as the issue of her predeceased birth mother because of this statutory bar to inheritance. After the death of her birth mother, the child's great-aunt by birth had adopted her. The adoption was prior to her grandfather's death. By virtue of the adoption, the child lost her status as a natural grandchild of that grandfather and became an adopted niece who could not then share in intestacy with his other natural-born grandchildren.<sup>232</sup>

The statute does include an exception to its general rule eliminating an adopted child's right to inherit from, through, or by the birth parents from the time of adoption.<sup>233</sup> When a birth parent is the spouse of the adopting parent, the statute leaves the adopted child in the family of the parent who is being replaced by the adoption.<sup>234</sup> Because the adopted child is not excised from the family of the parent who is replaced by the adoption in the case of a stepparent adoption, the child may inherit from both birth parents as well as from the adopting stepparent. This statutory exception for stepparent adoptions seems particularly persuasive when one birth parent has died and the survivor has remarried. There is no reason to suppose that the severance of all ties to the family of the deceased birth parent is desirable for the child or necessary for the success of the adoption.

The adopted child's loss of inheritance rights in her or his birth family has withstood constitutional challenge as an impermissible bill of attainder.<sup>235</sup> The court in *Arciero v. Hager*<sup>236</sup> recognized that

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<sup>229</sup> *Id.* at 179.

<sup>230</sup> KY. REV. STAT. ANN. § 199.520(2) (Michie/Bobbs-Merrill 1991).

<sup>231</sup> 406 S.W.2d 151, 152 (Ky. 1966); *cf.* Kentucky Trust Co. v. Sweeney, 163 F. Supp. 450, 452 (W.D. Ky. 1958) (barring an adopted niece from sharing in a testamentary devise in her natural uncle's will).

<sup>232</sup> *Thornberry*, 406 S.W.2d at 152.

<sup>233</sup> KY. REV. STAT. ANN. § 199.520(2) (Michie/Bobbs-Merrill 1991).

<sup>234</sup> *Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989) (overruling *Arciero v. Hager*, 397 S.W.2d 50 (Ky. 1965)).

<sup>235</sup> *Arciero v. Hager*, 397 S.W.2d 50, 53 (Ky. 1965), *overruled on different grounds* by *Hicks v. Enlow*, 764 S.W.2d 68 (Ky. 1989).

<sup>236</sup> 397 S.W.2d 50 (Ky. 1965).

Kentucky's constitutional prohibition of bills of attainder relates only to punishment for crimes and does not apply to adjustments in civil inheritance rights. The court also determined that the legislation is not an impermissible *ex post facto* law because it acts only prospectively to define the inheritance rights of adopted children in the estates of birth relatives who died *after* the passage of the statute. The children affected by the statute, whether adopted before or after the passage of the statute, did not have any fixed right to inherit from birth family members who were alive when the act was passed. They had merely an unprotected expectancy.<sup>237</sup>

Kentucky also has a statute authorizing the adoption of an adult which purports to give such adoptions the same legal effect as the adoption of a minor.<sup>238</sup> Despite the statute's clear language equating adult adoptions to adoptions of minors, in *Minary v. Citizens Fidelity Bank & Trust Company*<sup>239</sup> the court limited the statute's effect. If the adult was adopted for the purpose of bringing the adoptee under the terms of a pre-existing testamentary instrument and it is clear that the testator, a stranger to the adoption, did not intend to include such person, then the adult adoptee will not qualify for inheritance under the will.<sup>240</sup> In *Minary* the testator left most of her estate in trust for her spouse and three sons for life and provided for distribution of the trust, upon the death of the last life tenant, to the testator's "then living heirs." Almost thirty years after the testator's death, one of the sons adopted his wife as his child. The wife survived the life tenants and claimed to be an heir of the testator. The court did not permit her to share in the principal of the trust created by her mother-in-law's will because to do so would have thwarted the intent of the testator and cheated the rightful heirs.<sup>241</sup>

The decision in *Minary* does not foreclose all inheritance by adult adoptees. If the testator under whose will the adopted child is claiming was the adopting parent, not a stranger to the adoption, the result should be different.<sup>242</sup> Similarly, the rationale of *Minary* might not be applicable if the testator executed the will after, not before, the adult adoption, even if the testator was a stranger to the adoption. The *Minary* rule also

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<sup>237</sup> *Id.* at 53-54.

<sup>238</sup> KY. REV. STAT. ANN. § 405.390 (adoption of an adult).

<sup>239</sup> 419 S.W.2d 340 (Ky. 1967).

<sup>240</sup> *See id.* at 344.

<sup>241</sup> *Id.* at 343-44.

<sup>242</sup> *See id.* at 342 (citing *Woods v. Crump*, 142 S.W.2d 680 (Ky. 1940)).

should not be applied if there is any other indication that the testator intended to include the adult adoptee.

The *Minary* holding is limited to adult adoptions affecting testamentary, not intestate, inheritance. In *Harper v. Martin*,<sup>243</sup> a seemingly inconsistent case decided after *Minary*, the court permitted an adult adoptee to inherit in intestacy through the adopting parent. The court's rationale for the decision was that because the decedent had not prepared a will, the adult adoption did not thwart any testamentary plan.<sup>244</sup> In the *Harper* case the adopting parent, an heir apparent of the decedent, suffered from terminal cancer. As in *Minary*, the claimant was adopted solely for the purpose of qualifying him for inheritance from the decedent through the adopting parent. Most importantly, just as the testator in *Minary* could not undo the effect of the adoption because she was dead, the decedent in *Harper* could not undo the effect of this adoption because he was a declared incompetent at the time of the adoption and remained so until his death. Therefore, he lacked the capacity to make a valid will disinheriting the adult adoptee.<sup>245</sup>

### C. Out-of-Wedlock Heirs

At the common law, a child born to parents who were not legally married to each other was stigmatized by society as a bastard and characterized by the law as a *filius nullius*—the child of no one. The child had no inheritance rights from anyone because the child legally had no parents.<sup>246</sup>

Today, the social stigma associated with an out-of-wedlock birth has lessened. In keeping with this trend, the Kentucky legislature recently amended its statutes to remove all reference to "legitimate," "illegitimate," "bastards," or similar terms and substituted the less pejorative terms "born in wedlock" and "born out of wedlock."<sup>247</sup> The law's harshness has been mitigated in a number of other ways. For instance, because the concept of being born out of wedlock has been narrowed, fewer births are so characterized.

At the common law, the offspring of parents who attempted to marry, but failed to contract a valid marriage, were born out of wedlock.<sup>248</sup>

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<sup>243</sup> 552 S.W.2d 690 (Ky. Ct. App. 1977).

<sup>244</sup> *Id.* at 692.

<sup>245</sup> *Id.*

<sup>246</sup> DUKEMINIER & JOHANSON, *supra* note 4, at 99-100.

<sup>247</sup> 1984 Ky. Acts ch. 16.

<sup>248</sup> OLIVE M. STONE, FAMILY LAW 218-19 (1977).

Under the current Kentucky statute, the issue of all illegal and void marriages, including incestuous marriages, are considered born in lawful wedlock.<sup>249</sup> Only children born to parents who never attempted to marry before the birth of the child are now classified as born-out-of-wedlock children.

The courts' liberal interpretation of this statute has further narrowed the meaning of "born out of wedlock." For example, Kentucky does not permit common law marriages.<sup>250</sup> Nevertheless, in *Copenhaver v. Hemphill*,<sup>251</sup> the court permitted a child to inherit real property located in Kentucky from the paternal great-uncle, a Kentucky domiciliary, even though the child was born of a common law marriage that was void even in the state where it was contracted.<sup>252</sup> In *Copenhaver* the claimant's parents were living together at the time of her birth in Ohio, a state which permitted a couple to contract a common law marriage. The evidence established that the parents' actions would have constituted a common law marriage in Ohio but for the fact that the mother lacked the legal capacity to contract a marriage of any type with anyone because she was legally married to someone else. The court nevertheless permitted the claimant to inherit from the decedent by characterizing her as the issue of a "void common law marriage."<sup>253</sup> Thus classified, the statute then legitimated her.

There are other cases evidencing the courts' broad reading of KRS section 391.100. Even if the parents enter into a marriage with the full knowledge that one of the parents is still married to another, the issue are still treated as born in wedlock.<sup>254</sup> The statute also legitimates a child conceived before, but born after, the void marriage of its parents.<sup>255</sup>

It is both illogical and unjust to stigmatize and penalize the offspring of liaisons between unmarried persons. Statutes which purport to bar or limit the inheritance rights of such children do not deter sexual relationships between

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<sup>249</sup> KY. REV. STAT. ANN. § 391.100 (Michie/Bobbs-Merrill 1984) (treating children of illegal or void marriages as if born in lawful wedlock).

<sup>250</sup> *Pendleton v. Pendleton*, 531 S.W.2d 507, 509-10 (Ky. 1975), *rev'd on other grounds*, 560 S.W.2d 538 (Ky. 1977).

<sup>251</sup> 235 S.W.2d 778 (Ky. 1951).

<sup>252</sup> *Id.* at 779.

<sup>253</sup> *Id.*

<sup>254</sup> See *Martin v. Coburn*, 98 S.W.2d 483, 484 (Ky. 1937) (father still married to another at time of second marriage); *Leonard v. Braswell*, 36 S.W. 684, 685-86 (Ky. 1896) (father still married to another at time of second marriage) (construing a former version of KRS § 391.100).

<sup>255</sup> *Swinney v. Klippert*, 50 S.W. 841, 841-42 (Ky. 1899) (holding that the child was legitimate even though the child was conceived prior to the parents' attempted marriage, which was invalid because the father's divorce from his first wife was not finalized until two weeks after his second marriage).

unmarried persons. Visiting the penalty for such relationships on the child offends the basic concept that legal penalties should result from individual wrongdoing.<sup>256</sup> Obviously, no child is responsible for the conditions of her or his birth. In Kentucky, the trend toward ameliorating the harshness of the common law's treatment of out-of-wedlock children culminated in the invalidation of the statute<sup>257</sup> purporting to regulate the inheritance rights of out-of-wedlock children.<sup>258</sup>

The Kentucky statute at issue provided that an out-of-wedlock child could inherit from her or his mother and her kindred and that they could, in turn, inherit from the child.<sup>259</sup> In contrast, an out-of-wedlock child could inherit from and through her or his father only if the parents married and the father acknowledged the child.<sup>260</sup> The same limitation applied to the right of the father and his kindred to inherit from the out-of-wedlock child.<sup>261</sup> Because the United States Supreme Court in *Trimble v. Gordon*<sup>262</sup> invalidated a similar state statute as an unconstitutional denial of equal protection to out-of-wedlock children, the Kentucky Supreme Court invalidated the Kentucky statute in *Pendleton v. Pendleton*.<sup>263</sup>

In *Pendleton* the claimant was an out-of-wedlock infant child of the decedent whose paternity had been established by a court adjudication during the lifetime of the decedent. The claimant raised only the issue of the constitutional validity of that part of the statute limiting an out-of-wedlock child's right to inherit from her or his father.<sup>264</sup> Therefore, the child's challenge did not raise the issue of the statutory limitation on the father's right to inherit from his out-of-wedlock child. The court, however, did not expressly limit its decision to the statutory restrictions on the rights of out-of-wedlock children to inherit from their fathers. In a subsequent case, the Kentucky Supreme Court in dicta characterized the *Pendleton* decision as invalidating the statute "in toto."<sup>265</sup>

As a result of *Pendleton* and its progeny, out-of-wedlock children had the same inheritance rights as children born in wedlock. An Attorney General's

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<sup>256</sup> *Trimble v. Gordon*, 430 U.S. 762, 769-70 (1977).

<sup>257</sup> KY. REV. STAT. § 391.090, *repealed by* 1986 Ky. Acts ch. 331.

<sup>258</sup> *Pendleton v. Pendleton*, 560 S.W.2d 538, 539 (Ky. 1977).

<sup>259</sup> KY. REV. STAT. § 391.090(2), *repealed by* 1986 Ky. Acts ch. 331.

<sup>260</sup> *Id.* § 391.090(3).

<sup>261</sup> *Id.* § 391.090(1).

<sup>262</sup> 430 U.S. 762 (1977).

<sup>263</sup> 560 S.W.2d 538 (Ky. 1977); *cf.* *Rudolph v. Rudolph*, 556 S.W.2d 152, 154 (Ky. Ct. App. 1977) (invalidating KY. REV. STAT. § 391.090 as violative of KY. CONST. § 2).

<sup>264</sup> *Pendleton*, 560 S.W.2d at 539.

<sup>265</sup> *Fykes v. Clark*, 635 S.W.2d 316, 318 (Ky. 1982).

opinion interpreted *Pendleton* to mean that an out-of-wedlock child inheriting from her or his father is entitled to claim a child's exemption for inheritance tax purposes and is entitled to the same share in intestacy as that of an in-wedlock child.<sup>266</sup> In a testamentary situation, the court treated an out-of-wedlock child as the issue of his paternal grandfather for inheritance purposes.<sup>267</sup> In *Murray v. Murray*,<sup>268</sup> the child's father, the testator, died leaving a will gift to his own, already-deceased father. Kentucky's antilapse statutes permit the issue of a beneficiary who predeceases the testator to take the will gift that the beneficiary would have taken if living.<sup>269</sup> The court held that all of the grandchildren of the testator's father, including the out-of-wedlock child of the testator, were the grandfather's issue and thus entitled to share the will gift to their grandfather.<sup>270</sup>

Subsequently, in *Fykes v. Clark*<sup>271</sup> the court permitted a posthumous, out-of-wedlock child to inherit in intestacy from his father. The claimant was born seven months after the death of the decedent to a woman who had never married the decedent. Although the putative father was dead, the court permitted the claimant to establish that the decedent was his father, and the claimant successfully established his paternity. Thus, he had the same right to inherit from the decedent as did a child born in wedlock to the decedent.<sup>272</sup>

Although the Kentucky Supreme Court invalidated Kentucky's statute delimiting inheritance rights of out-of-wedlock children in 1977, the Kentucky legislature did not enact a statute to fill the void created by the *Pendleton* decision for almost a dozen years. In 1988, the legislature adopted KRS section 391.105, establishing different statutory rules for determining the rights of intestate succession for children born out of wedlock depending on the gender of the parent from, through or by whom the right of inheritance is claimed.<sup>273</sup>

Similar to its predecessor, KRS section 391.105 provides that an out-of-wedlock child is the child of the natural mother.<sup>274</sup> Without limitation, the child can inherit from her and her kindred, and the mother and

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<sup>266</sup> Op. Ky. Att'y Gen. 77-412 (1977).

<sup>267</sup> *Murray v. Murray*, 564 S.W.2d 5, 8 (Ky. 1978).

<sup>268</sup> *Id.*

<sup>269</sup> KY. REV. STAT. ANN. § 394.400 (Michie/Bobbs-Merrill 1984).

<sup>270</sup> *Murray*, 564 S.W.2d at 8.

<sup>271</sup> 635 S.W.2d 316 (Ky. 1982).

<sup>272</sup> *Id.* at 318.

<sup>273</sup> 1988 Ky. Acts ch. 90, § 3.

<sup>274</sup> KY. REV. STAT. ANN. § 391.105(1) (Michie/Bobbs-Merrill Supp. 1992).

her kindred can in turn inherit without limitation from the out-of-wedlock child. KRS section 391.105 expands the out-of-wedlock child's right to inherit from and through her or his father and the father's right to inherit from his child. These rights, however, are not as generous as those afforded an out-of-wedlock child whose mother dies intestate.<sup>275</sup> If the biological parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void, the child may inherit from or through the father.<sup>276</sup> In addition, an out-of-wedlock child or the child's descendants can inherit from or through the child's biological father if there was either an adjudication of paternity before the father died or an adjudication of paternity, based upon clear and convincing evidence, after the father's death.<sup>277</sup>

KRS section 391.105(1)(c) imposes the most onerous restrictions on the right of the father or his kindred to inherit from or through the out-of-wedlock child. An adjudication of paternity before the death of the out-of-wedlock child is sufficient to confer a right of inheritance on the father and his kindred.<sup>278</sup> A posthumous adjudication of paternity alone, based upon clear and convincing evidence, however, does not authorize inheritance by the father or his kindred. The adjudication must be accompanied by evidence demonstrating that the father "openly treated the child as his, and that [he] did not follow a consistent policy of refusing to support the child on the ground of nonpaternity."<sup>279</sup>

Because of the difficulty of proving paternity and the concomitant danger of spurious claims, the United States Supreme Court authorized, and KRS section 391.105 legislates, the use of the higher "clear and convincing" standard of proof when the claimant asserts a right to inherit in intestacy from her or his putative father<sup>280</sup> or when the father of an out-of-wedlock child claims a right to inherit from his putative child. In *Fykes v. Clark*<sup>281</sup> the court addressed the issue of what quantum and type of evidence satisfies this heightened standard of proof. The claimant in *Fykes* asserted that he was the posthumous, out-of-wedlock child of the decedent. His proof consisted of uncontradicted testimony from his mother, his paternal aunt, and a longtime

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<sup>275</sup> See *id.* § 391.105(1)(b).

<sup>276</sup> *Id.* § 391.105(1)(a).

<sup>277</sup> *Id.* § 391.105(1)(b).

<sup>278</sup> *Id.* § 391.105(1)(c)1.

<sup>279</sup> *Id.* § 391.105(1)(c)2.

<sup>280</sup> See *Trimble v. Gordon*, 430 U.S. 762, 770-72 (1977).

<sup>281</sup> 635 S.W.2d 316 (Ky. 1982); *cf.* *Hibbs v. Chandler*, 684 S.W.2d 310 (Ky. Ct. App. 1985) (holding that the mother is not required to prove by clear and convincing evidence that the putative father was the child's father in order to survive a motion for summary judgment in a paternity suit).

friend of the decedent who was the uncle of the decedent's ex-wife. The testimony of these witnesses established that the nature of the relationship between the claimant's mother and the decedent was consistent with the decedent being the father. It also established that the decedent had told the witnesses that he was the father and that he and the claimant's mother had planned to marry on the weekend that the decedent died. There was also testimony from the witnesses that the claimant bore a physical resemblance to the decedent. This proof satisfied the clear and convincing standard.<sup>282</sup> Although the proof in the *Fykes* case was uncontradicted, the court made it clear that this heightened standard does not require uncontradicted proof. "[I]f there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent minded people," then the standard of clear and convincing evidence is satisfied.<sup>283</sup>

Although the *Fykes* court permitted inheritance by a posthumous, out-of-wedlock child, inheritance by a posthumous, out-of-wedlock child and the alternative methods of establishing paternity for inheritance purposes set out in KRS section 391.105 may not be constitutionally required. A short time after invalidating an inheritance statute similar to Kentucky's in *Trimble v. Gordon*,<sup>284</sup> the United States Supreme Court decided *Lalli v. Lalli*.<sup>285</sup> The *Lalli* Court sustained a New York inheritance statute that provided only one, very restrictive, antemortem method by which an out-of-wedlock child could prove paternity and inherit from her or his father in intestacy. Under the New York statute, the child could inherit only if a court order of filiation was obtained prior to the father's death. Paternity was not at issue in *Lalli* because the decedent had acknowledged paternity of the child in a notarized permission for the child to marry. Nonetheless, the Court did not permit the child to inherit because he lacked the required antemortem court order of filiation.<sup>286</sup>

The *Trimble* and *Lalli* decisions require much less generous inheritance rights for out-of-wedlock children than Kentucky law presently confers on them. The statute at issue in *Trimble* provided no method by which an out-of-wedlock child could make herself or himself an heir of her or his father. Only the father, by marrying the child's mother, could confer heirship on his out-of-wedlock child.<sup>287</sup> Consequently, the statute

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<sup>282</sup> *Id.* at 318.

<sup>283</sup> *Id.* (quoting *Clemens v. Richards*, 200 S.W.2d 156, 159 (Ky. 1947)).

<sup>284</sup> 430 U.S. 762 (1976).

<sup>285</sup> 439 U.S. 259 (1978).

<sup>286</sup> *See id.* at 275.

<sup>287</sup> *Trimble*, 430 U.S. at 764-65.



denied equal protection to out-of-wedlock children. The *Lalli* statute avoided constitutional infirmity by providing a method by which an out-of-wedlock child could force heirship on a reluctant father. The child, or someone on behalf of the child, could initiate a filiation proceeding during the father's lifetime.<sup>288</sup> Thus, as long as there is one method by which the child can establish a right to inherit from her or his father, even if that method is an antemortem method only, alternative or more generous methods of qualifying an out-of-wedlock child for inheritance rights in her or his father's estate are not constitutionally required.

#### D. Half-Blood Heirs

The term "half blood" refers to a collateral, consanguineous relative of the decedent with whom the decedent shares only one common ancestor rather than the usual two.<sup>289</sup> For instance, if the decedent and a sibling have the same mother (the common ancestor), but have different fathers, that sibling is a half-blood sister or brother of the decedent.<sup>290</sup> Similarly, if the decedent and a maternal cousin share the same maternal grandmother (the common ancestor), but have different maternal grandfathers, the cousin is a half-blood cousin to the decedent. A decedent can only have half-blood, collateral relatives and cannot have a half-blood ancestor or descendant.<sup>291</sup> For example, if the decedent has children by a number of different spouses, all of the children are descendants of the decedent and all are equally the children of the decedent. The decedent is the full-blood parent of all of the children.

In many states half-blood heirs have the same inheritance rights as full-blood heirs.<sup>292</sup> In Kentucky, by statute, collaterals of the half blood "inherit only half as much as those of the wholeblood, or as ascending kindred, when they take with either."<sup>293</sup> The statutory reference to ascending kindred was originally necessary because an earlier form of the statute, which identifies the decedent's intestate takers, created a class of

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<sup>288</sup> *Lalli*, 439 U.S. at 261-62.

<sup>289</sup> ATKINSON, *supra* note 3, at 50.

<sup>290</sup> *Id.* at 51.

<sup>291</sup> *Id.* at 50-51.

<sup>292</sup> *Id.* at 74; see also *Morris v. Sparrow*, 459 S.W.2d 768, 769 (Ky. 1970) (suggesting that, without a statute to the contrary, a half-blood would share equally with those of the full blood).

<sup>293</sup> KY. REV. STAT. ANN. § 391.050 (Michie/Bobbs-Merrill 1984). This is the Scottish system of inheritance for half bloods. See Thomas E. Atkinson, *Succession Among Collaterals*, 20 IOWA L. REV. 185, 197 (1934-35).

intestate takers comprised of the decedent's "mother, brothers, and sisters."<sup>294</sup> Under that statute it was possible for half-blood collaterals (brothers and sisters) to inherit with ascending kindred (the decedent's mother).<sup>295</sup> Currently, no statutory class of intestate takers includes collateral and ascending kindred;<sup>296</sup> therefore, the reference to ascending kindred is now meaningless.

To determine whether the half blood statute applies, one must determine the class of intestate takers entitled to inherit under KRS section 391.010, which establishes the order of descent and distribution of the decedent's intestate property. Before any subsequent class of heirs may take, all those in the preceding class must have predeceased the decedent. If there is even one member of a preceding class alive at the decedent's death, no member of a subsequent class may inherit.<sup>297</sup> Thus, if siblings or their descendants, as well as aunts and uncles, survive the decedent, under the statute, the siblings or their descendants<sup>298</sup> exclude the aunts and uncles.<sup>299</sup>

Application of the half blood statute does not disturb these rules about the order of descent and distribution of the decedent's property. If descendants of predeceased half-blood brothers as well as whole-blood aunts and uncles survive the decedent, the descendants of the half-blood brothers take the entire estate to the exclusion of the whole-blood aunts and uncles.<sup>300</sup> The half-blood takers belong to a class of intestate heirs which precedes the class of "uncles and aunts and their descendants" in the statutory order of inheritance.<sup>301</sup> In fact, because the class first entitled to take, "brothers and sisters and their descendants,"<sup>302</sup> does not include any full-blood heirs, the statutory provisions relevant to the size of the share of half-blood heirs in relationship to full-blood heirs is inapplicable. The provision only applies to the apportionment of the estate

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<sup>294</sup> See *Milner v. Calvert*, 58 Ky. (1 Met.) 472, 475 (1858) (quoting the descent and distribution statute in force at the time, which was Ky. Revised Statutes, Chap. 30, sec. 1.3, p. 279 (1852)).

<sup>295</sup> *Id.* at 476 (holding that the mother of the deceased child took double the share of the deceased child's half blood sister or brother).

<sup>296</sup> See KY. REV. STAT. ANN. § 391.010 (Michie/Bobbs-Merrill 1984).

<sup>297</sup> *Ryburn v. First Nat'l Bank of Mayfield*, 399 S.W.2d 313, 315 (Ky. 1965) (holding that a grandniece and a grandnephew could not contest the testator's will as they were not intestate takers of the testator).

<sup>298</sup> KY. REV. STAT. ANN. § 391.010(3) (Michie/Bobbs-Merrill 1984).

<sup>299</sup> *Id.* § 391.010(5)(b).

<sup>300</sup> *Ragland v. Shrout*, 476 S.W.2d 820, 822 (Ky. 1972).

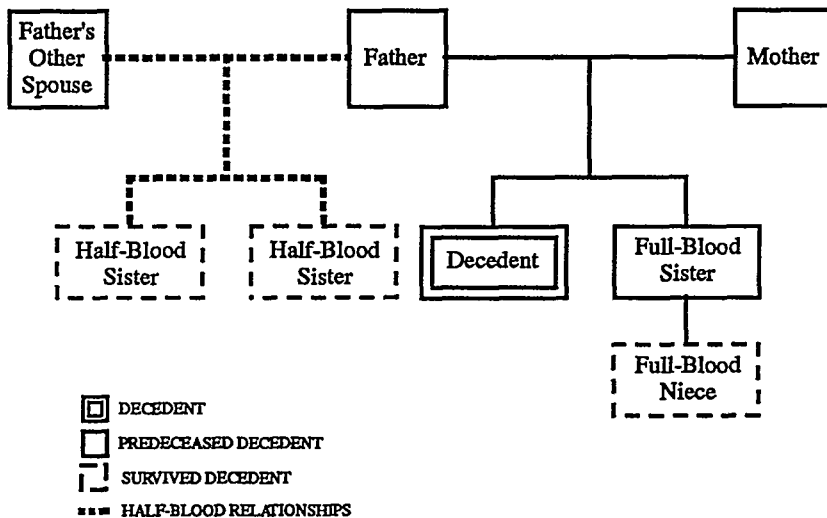
<sup>301</sup> See KY. REV. STAT. ANN. § 391.010.

<sup>302</sup> *Id.* § 391.010(3) (Michie/Bobbs-Merrill 1984).

within a class of takers which consists of both full- and half-blood claimants. If the class members are all half bloods, they not only exclude members of all subsequent classes of potential heirs, but they also share the estate equally among themselves.<sup>303</sup>

If there are both full-blood and half-blood heirs within the class, the half blood statute applies. Even if some of the members of the class of heirs predeceased the decedent but left issue who survived the decedent, the half blood statute still applies as long as there are both full- and half-blood heirs within the class.

FIGURE 7



In *Morris v. Sparrow*<sup>304</sup> two sisters of the half blood and the daughter of a full-blood sister who predeceased the decedent survived the decedent (see Figure 7). The presence of the full-blood niece did not exclude inheritance by the decedent's half-blood sisters. Under the half blood statute the niece merely took a share twice as large as the share of

<sup>303</sup> *Holmes v. Lane*, 123 S.W. 318, 321 (Ky. 1909) (holding that the half-blood maternal aunts and uncles inherited all of the realty that the infant decedent had inherited from his mother).

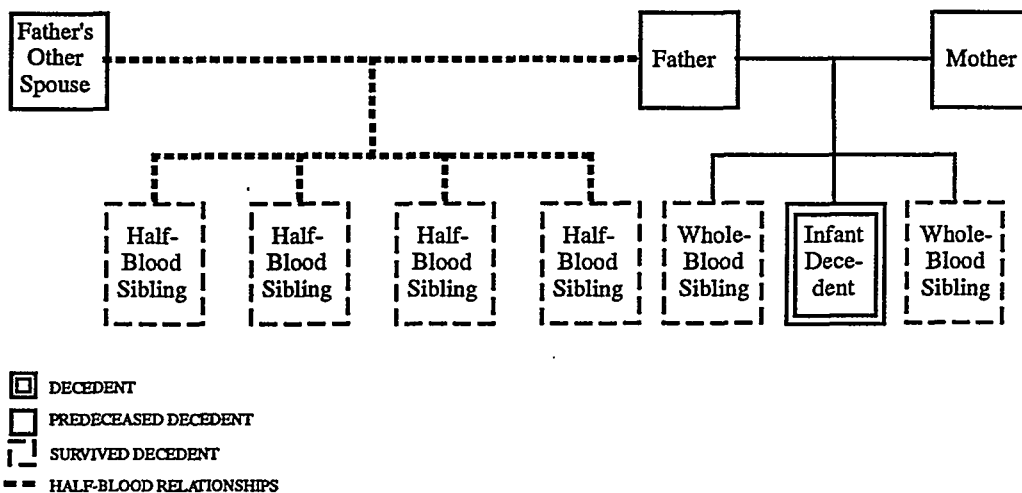
<sup>304</sup> 459 S.W.2d 768 (Ky. 1970).



there were no heirs to inherit under any of the first four statutory classes of intestate takers, the estate was divided into two moieties.<sup>308</sup> The half blood statute applies to each moiety separately. Thus, the entire maternal moiety of one-half of the estate passed to the maternal half-blood cousin while the paternal full-blood cousins shared only the paternal half of the estate.<sup>309</sup> Since the class first entitled to inherit the maternal moiety included only a half-blood and no full-blood claimants, the half blood statute had no application at all to the distribution of this decedent's estate. The paternal cousins had no claim to the maternal moiety and the half blood statute did not create any new right to share in that moiety.

When half-blood and full-blood claimants compete to inherit real property that the decedent took from a parent, both the ancestral property statute<sup>310</sup> and the half blood statute<sup>311</sup> may apply. If the decedent was an infant without issue, any real property derived by gift, devise, or descent from one of the decedent's parents descends to that parent and to that parent's kindred under the ancestral property statute.<sup>312</sup>

FIGURE 9



In *White v. Hogue*<sup>313</sup> the infant decedent died owning realty that he had inherited from his father. Only two whole-blood siblings and four half-

<sup>308</sup> *Id.* at 78.

<sup>309</sup> *Id.* at 79.

<sup>310</sup> KY. REV. STAT. ANN. § 391.020 (Michie/Bobbs-Merrill 1984).

<sup>311</sup> *Id.* § 391.050.

<sup>312</sup> *Id.* § 391.020(2).

<sup>313</sup> 291 S.W.2d 22 (Ky. 1956).

blood siblings, who were the children of the decedent's father from a first marriage, survived the infant (see Figure 9). The half blood statute would be applicable if the decedent's siblings had inherited the ancestral property as collateral relatives of the decedent. The two full bloods would each then inherit one-fourth of the realty and the four half-blood siblings would each take a one-eighth interest. In two previous decisions of Kentucky's highest court, this was the result.<sup>314</sup>

In the *White* case, however, the court reconsidered its earlier interpretation of the ancestral property clause and concluded that the descent of ancestral property of an infant who dies without issue is determined by the relationship of the claimants to the *parent* who gave the property to the decedent, rather than by the relationship of the claimants to the infant decedent.<sup>315</sup> In *White* the claimants, two whole-blood and four half-blood siblings of the decedent, were all descendants of the father.<sup>316</sup> Because a person never has descendants or ascendants of the half blood, the descendants of the *parent*, the father, were all full bloods. As a result, the half blood statute was inapplicable and each child took a one-sixth interest in the ancestral property.

The half blood statute is also applicable when the class entitled to take is composed of out-of-wedlock, half-blood heirs and out-of-wedlock, full-blood heirs of the decedent.<sup>317</sup> If the decedent is survived by three siblings with whom the decedent shared the same mother, but only two of those siblings shared the same father with the decedent and the decedent's mother never married either of the fathers, the half blood statute applies. The half-blood, out-of-wedlock child of the decedent's mother inherits a share that is one-half the size of the share of the out-of-wedlock, full-blood sibling of the decedent.<sup>318</sup> This was the result even before the Kentucky legislature gave out-of-wedlock heirs the same inheritance rights as heirs born in wedlock.<sup>319</sup>

After determining that the half blood statute is applicable, one must still determine the size of the claimants' shares. In ascertaining the

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<sup>314</sup> *Talbott's Heirs v. Talbott's Heirs*, 56 Ky. (17 B. Mon.) 1, 6 (Ky. 1856), *overruled* by *White v. Hogge*, 291 S.W.2d 22 (Ky. 1956); *King v. Middlesborough Town & Lands Co.*, 50 S.W. 37 (1899), *overruled* by *White v. Hogge*, 291 S.W.2d 22 (Ky. 1956).

<sup>315</sup> *White v. Hogge*, 291 S.W.2d 22, 25 (Ky. 1956).

<sup>316</sup> *Id.* at 23.

<sup>317</sup> *Stevenson v. Washington's Adm'r*, 21 S.W.2d 274, 275-76 (Ky. 1929); *cf.* *West v. Hardwick's Ex'r*, 191 S.W.2d 385, 386 (Ky. 1946) (finding the term "heirs" to include relatives of the half blood unless the testator intended otherwise).

<sup>318</sup> *Stevenson*, 21 S.W.2d at 275.

<sup>319</sup> *Id.* at 275-76.

number of shares, every full-blood collateral who is entitled to inherit counts twice and every half-blood collateral counts only once.<sup>320</sup> If there is one whole-blood and one half-blood heir, the estate is divided into thirds. The whole blood is entitled to twice as much of the estate, or two-thirds, while the half blood takes one-third.<sup>321</sup> If there are eight claimants in the class entitled to take and seven of them are half-blood heirs, the estate is divided into nine shares. The seven half bloods count once and the one whole blood counts twice in determining the proper fractional division of the decedent's property. The whole blood takes a two-ninths share and each half blood takes half as much, or a one-ninth share.<sup>322</sup>

### *E. Step Heirs*

A "step" relationship is not a sufficient legal relationship to the decedent to give rise to any right to share in the estate of the "step" relative.<sup>323</sup> Perhaps the unwillingness to give legal recognition to such a relationship, regardless of its duration, comes in part from the difficulty of defining "step" relationships. The complex family situations that often give rise to "step" relationships create a number of questions regarding the formation of such relationships. Must a stepchild be a minor in order to create a "step" relationship, or is the stepchild's age immaterial? Does the "step" relationship terminate upon the divorce of a stepparent and a biological parent? Must one of the child's biological parents be dead in order for a "step" relationship to exist between the child and the new spouse of the other biological parent? Does a stepparent-stepchild relationship arise when the child is born out of wedlock and the biological mother marries someone other than the biological father? If both biological parents remarry, does the child form a "step" relationship with both of the new spouses or only with the new spouse of the biological parent with whom the child resides?<sup>324</sup>

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<sup>320</sup> *Nixon's Heirs v. Nixon's Adm'r*, 38 Ky. (8 Dana) 5, 7 (1839).

<sup>321</sup> *Covington v. Beck*, 292 S.W. 752, 753 (Ky. 1927) (holding that the full-blood brother took two-thirds and the half-blood sister took one-third); cf. *Brown v. Saunders*, 389 S.W.2d 77, 78 (Ky. 1965) (finding that the appellants incorrectly proposed a division of the estate of three-quarters to whole-blood claimants and one-quarter to half-blood claimant).

<sup>322</sup> *Nixon's Heirs*, 38 Ky. (8 Dana) at 10.

<sup>323</sup> *Culleton v. Keune*, 39 S.W. 511, 512 (Ky. 1897) (stepson had no claim in stepfather's estate even though his mother contributed significantly to its formation).

<sup>324</sup> See Bernard J. Berkowitz, *Legal Incidents of Today's "Step" Relationship: Cinderella Revisited*, 4 FAM. L.Q. 209 (1970) (exploring when and under what

*F. Alien Heirs*

Aliens did not suffer any disabilities with respect to the acquisition, ownership or transfer of personalty at the common law, but they did with respect to land.<sup>325</sup> Aliens could take real property by purchase or devise, but not by descent (that is, they could inherit land by will, but not in intestacy), and the land was subject to seizure by the sovereign at any time.<sup>326</sup> Even if the sovereign did not exercise that right during the alien's lifetime, the realty could not pass by either intestate or testate inheritance at the death of the alien.<sup>327</sup>

While a number of Kentucky statutes relax some of the common law limitations on an alien's ability to acquire, hold or transfer land, the statutes do not remove all of the disabilities.<sup>328</sup> These statutes are in the form of "enabling acts" that do not change the common law except to the extent that the common law is inconsistent or repugnant to the statutes.<sup>329</sup> In Kentucky, for example, a nonresident alien may hold real property acquired in any manner, including acquisition by descent or devise,<sup>330</sup> for a period of eight years.<sup>331</sup> This partially removes one of the disabilities that aliens suffered under the common law by enabling the alien to hold the property for the statutory period against the state, or sovereign.<sup>332</sup>

If the nonresident alien does not dispose of the land within the stipulated time period, however, the common law power of the sovereign

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circumstances a stepparent's obligation to support a stepchild will arise).

<sup>325</sup> ATKINSON, *supra* note 3, at 53-54.

<sup>326</sup> *Ripley v. Von Zedtwitz*, 256 S.W. 1106, 1107-08 (Ky. 1923) (holding that real estate that is devised to a nonresident alien and that is not disposed of within the eight-year statutory period does not pass to the testator's next of kin capable of inheriting because only the state may challenge the right of an alien to hold real property).

<sup>327</sup> ATKINSON, *supra* note 3, at 54.

<sup>328</sup> See KY. REV. STAT. ANN. §§ 381.290 (alien's property rights); 381.300 (escheat provisions); 381.310 (spouse and children of citizens); 381.320 (alien's rights to personalty and rights to real property, if the alien is a nonresident); 381.330 (right of nonresident alien to inherit real property); 381.340 (distribution of property on the death of a nonresident alien); 391.030(1)(b) (descent of personalty); and 391.060 (title may be inherited through an alien) (Michie/Bobbs-Merrill 1992).

<sup>329</sup> *Ripley*, 256 S.W. at 1108.

<sup>330</sup> KY. REV. STAT. ANN. § 381.330 (Michie/Bobbs-Merrill 1992) (right of nonresident aliens to inherit real property).

<sup>331</sup> *Id.* § 381.300(1) (realty of nonresident alien liable to escheat after eight years). Also, the alien heir takes subject to any dower rights of the alien's surviving spouse. *Eustache v. Rodaquest*, 74 Ky. (11 Bush) 42, 46 (Ky. 1874).

<sup>332</sup> *Ripley*, 256 S.W. at 1108.



is restored. The State may elect at any time thereafter to escheat the property,<sup>333</sup> although there is no automatic reversion to the State. The land stays with the nonresident alien unless the State affirmatively exercises its power to escheat the property by bringing an action in circuit court.<sup>334</sup> The State is the only party legally capable of enforcing the eight-year limitation period through its escheat powers.<sup>335</sup> Even if the nonresident alien acquires the land by descent or devise, the decedent's relatives who would have inherited after the alien may not complain if the alien holds the land beyond the permissible time period.<sup>336</sup>

The statutes are not completely integrated into a unified system defining the rights of aliens who acquire an interest in real or personal property in Kentucky. For example, one statute purports to eliminate all impediments to any alien's right to inherit intestate personalty.<sup>337</sup> Another statute, however, imposes two limitations on an alien's ability to take and hold personal property in the same manner as a citizen. Only *friendly* aliens may take personalty as a citizen would, and chattels real (leaseholds) are expressly excluded from the term "personalty."<sup>338</sup>

The statutes are riddled with distinctions between the rights of resident aliens in the process of naturalization, resident aliens not in the process of naturalization, and nonresident aliens. Resident aliens in the process of naturalization suffer no disabilities as they are expressly permitted to inherit, hold, and pass by descent, devise, or otherwise any interest in personal or real property.<sup>339</sup> Resident aliens who are not in the process of naturalization may hold real property acquired for the purpose of a residence, occupation, business, or trade for as long as they remain residents of the state.<sup>340</sup> During their residency, such aliens have all the rights, remedies, and exemptions concerning their real property as would a citizen.<sup>341</sup> Presumably, this includes the right to transmit the real estate so held at death by either descent or devise. The statutes do not expressly resolve the dilemma posed by a resident alien who holds land for one of the purposes enumerated above but later ceases to be a

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<sup>333</sup> KY. REV. STAT. ANN. § 381.300(1) (Michie/Bobbs-Merrill Supp. 1992).

<sup>334</sup> Op. Ky. Att'y Gen. 76-332 (1976).

<sup>335</sup> *Ripley*, 256 S.W. at 1108; see *Commonwealth v. Tamer*, 169 S.W.2d 19, 20-21 (Ky. 1943) (holding that the board of education of the district in which the property is located or the attorney general may institute suit in the name of the Commonwealth).

<sup>336</sup> *Ripley*, 256 S.W. at 1108.

<sup>337</sup> KY. REV. STAT. ANN. § 391.030(1)(b) (Michie/Bobbs-Merrill Supp. 1992).

<sup>338</sup> *Id.* § 381.320.

<sup>339</sup> *Id.* § 381.290.

<sup>340</sup> *Id.* § 381.320.

<sup>341</sup> *Id.*

resident of the state. Logically, the statute imposing an eight-year limit on the holding of real property by a nonresident alien<sup>342</sup> should become applicable and begin to run.

Regardless of the manner of acquisition, nonresident aliens may take and hold real property for eight years.<sup>343</sup> If nonresident aliens obtain possession of real estate by descent or devise and die before the expiration of the term limiting their right of enjoyment or sale, they are expressly given the power to pass such rights by descent or devise.<sup>344</sup> If the heir or devisee is also a nonresident alien, KRS section 381.300 is unclear as to whether the alien merely has the remainder of the decedent's eight-year term before the State can escheat the property or whether inheritance by a nonresident alien begins a new period of holding under the statutes.<sup>345</sup>

The legislature has placed numerous limitations on the State's escheat power. For example, the State's power to escheat the real property of aliens is eliminated if the alien becomes a citizen of the United States before the State has escheated the property.<sup>346</sup> Similarly, any purchaser, lessee, heir or devisee of an alien's real property who is a United States citizen takes the land free from any right of the State to thereafter exercise its power of escheat.<sup>347</sup> This is true even if the State had a present right to escheat the land before the purchase, lease, descent, or devise. None of the limitations placed on the right of resident and nonresident aliens to take and hold real or personal property by devise, purchase, descent, or distribution apply if the alien's spouse is a United States citizen.<sup>348</sup> In addition, regardless of where the alien was born, the limitations imposed by these statutes are inapplicable if either the mother or the father of the alien was an American citizen at the time of the alien's birth.<sup>349</sup>

If a trustee who is an American citizen holds real property on active trust for the benefit of a nonresident alien beneficiary, an interesting question arises whether the statutes limiting aliens' rights to acquire, hold and dispose of real property apply. In one case addressing this issue,<sup>350</sup>

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<sup>342</sup> *Id.* § 381.300(1).

<sup>343</sup> *Id.*; *id.* § 381.330.

<sup>344</sup> *Id.* § 381.300(2).

<sup>345</sup> *See id.*

<sup>346</sup> *Id.* § 381.300(2).

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* § 381.310.

<sup>349</sup> *Id.*

<sup>350</sup> *Ripley v. Von Zedtwitz*, 256 S.W. 1106 (Ky. 1923).

the court assumed, but expressly did not decide, that the land was subject to the statutory limitations.<sup>351</sup> Two subsequent opinions of the Kentucky Attorney General provide support for the proposition that such property should not be subject to escheat by the State.<sup>352</sup> In both opinions the Attorney General found that the escheat provisions were inapplicable to real property if the real property was held by a Kentucky corporation formed by a nonresident alien or if the corporation's shares were partially or wholly owned by a nonresident alien. The opinions reasoned that the owner of stock in a corporation does not become the *legal* owner of the corporation's real property and cannot deal with the corporate property as if it were the stockholder's own property. Rather, the stockholder owns stock in the corporation, which is a personalty interest. The law does not treat the stockholder as the legal owner of the corporate assets absent fraud or other special circumstances.<sup>353</sup> Thus, the distinction between the corporation and its shareholders shields the real property from the escheat provisions applicable to nonresident aliens.

This same reasoning can be applied in the trust context. *Legal* title to the trust property is in the trustee and only equitable title is in the beneficiary. Neither the trustee nor the beneficiary can ignore the existence of the trust and treat the property as if it were a nontrust asset of the beneficiary.<sup>354</sup> The courts enforce this division of ownership between the trustee and beneficiary absent fraud or other special circumstances.<sup>355</sup> Based on the distinctions between the trust and its beneficiaries and between property of the trust and the equitable ownership interest of the beneficiaries, real property in a trust ought not to be subject to escheat even if some or all of the beneficiaries are nonresident aliens.<sup>356</sup>

Kentucky's statutory limitations and restrictions on the ability of aliens to acquire, hold, and transfer real property also raise a number of constitutional questions. An opinion of the Kentucky Attorney General concludes that the statutes are constitutional unless they are contrary to a treaty between the United States and the country of which the alien is a citizen.<sup>357</sup> The opinion, however, is conclusory in nature and no Kentucky case expressly addresses the constitutionality of these statutes.<sup>358</sup>

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<sup>351</sup> *Id.* at 1108.

<sup>352</sup> Op. Ky. Att'y Gen. 78-585 (1978); Op. Ky. Att'y Gen. 77-576 (1977).

<sup>353</sup> Op. Ky. Att'y Gen. 78-585 (1978); Op. Ky. Att'y Gen. 77-576 (1977).

<sup>354</sup> AUSTIN W. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS § 2.7, at 130 (1960).

<sup>355</sup> GEORGE T. BOGERT, TRUSTS § 9 (6th ed. 1987).

<sup>356</sup> *Contra* 3A AM. JUR. 2D *Aliens and Citizens* § 2014 (1962).

<sup>357</sup> Op. Ky. Att'y Gen. 81-248 (1981).

<sup>358</sup> *Id.*

The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>359</sup> The amendment's protection depends upon a territorial concept, not citizenship. Therefore, resident aliens are within,<sup>360</sup> while nonresident aliens are probably outside, the equal protection guarantees of the United States Constitution.<sup>361</sup>

The precedential value of early decisions<sup>362</sup> of the United States Supreme Court that sustained state statutes restricting alien ownership of real property is very limited. The Court decided these cases before it began to treat alienage as a suspect class.<sup>363</sup> State laws which discriminate against a suspect class are subject to a strict scrutiny review.<sup>364</sup> The statutes are usually struck under this level of scrutiny because the state cannot show that the classification is strictly necessary to the achievement of a compelling state interest. The Supreme Court has characterized the alienage cases reviewed under the compelling state interest standard as involving statutes that withheld from aliens economic benefits that were generally available to citizens. The Court reasoned that resident aliens, like citizens, contribute to the economic welfare of the state through the payment of taxes. Therefore, absent some compelling state interest, a state cannot discriminate against aliens in the allocation of economic benefits.<sup>365</sup> Under the strict scrutiny standard of review, then, Kentucky's statutes restricting the rights of resident aliens to acquire, hold, and transfer real property would be struck as an impermissible denial of equal protection.

Recently, the United States Supreme Court has employed the less stringent rational relation test<sup>366</sup> to determine and sustain the validity of

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<sup>359</sup> U.S. CONST. amend. XIV, § 1.

<sup>360</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that Chinese subjects living in San Francisco were entitled to Fourteenth Amendment protection).

<sup>361</sup> *De Tenorio v. McGowan*, 510 F.2d 92, 101 (5th Cir.), *cert. denied*, 423 U.S. 877 (1975).

<sup>362</sup> *Terrace v. Thompson*, 263 U.S. 197 (1923) (holding that a state may prohibit landholding by an alien ineligible for American citizenship); *Frick v. Webb*, 263 U.S. 326 (1923) (holding that a state may forbid indirect ownership of agricultural land through a corporation when the majority of the corporation's stockholders are aliens).

<sup>363</sup> *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (treating alienage as inherently suspect and subject to strict judicial scrutiny; holding a statute denying welfare benefits to be unconstitutional).

<sup>364</sup> *E.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>365</sup> *Cabell v. Chavez-Salido*, 454 U.S. 432, 438 (1982) (holding that a statute denying resident aliens the right to be employed as deputy probation officers is constitutional).

<sup>366</sup> *Id.* at 438-40 (holding that alienage restrictions of economic interests are subject to a rational relation, and not a strict scrutiny, test).

statutory classifications based on alienage.<sup>367</sup> If Kentucky's statutes on the rights of resident aliens in real property were reviewed under this less demanding standard, the statutes would be sustained.

By its express terms, the Due Process Clause is not limited in its application by the territorial considerations embodied in the Equal Protection Clause. A state may not deprive "any person" of property without due process of law.<sup>368</sup> Procedural due process must be accorded to nonresident as well as resident aliens before they can be deprived of a validly acquired interest in real property.<sup>369</sup> Other escheat statutes in Kentucky similar to the ones applicable to aliens have been upheld as satisfying the due process guarantees of the Constitution as long as the state provides an opportunity to be heard.<sup>370</sup> The escheat statutes applicable to aliens do provide an alien with an opportunity to be heard in satisfaction of the due process requirements.<sup>371</sup> Consequently, the statutes regulating aliens' rights in real property probably satisfy the due process guarantees of the Fourteenth Amendment.

Provisions in treaties between the United States government and other foreign nations conferring procedural and substantive rights on foreign nationals with respect to land ownership in the United States supersede any contrary Kentucky statutes. Treaties, like valid acts of Congress, are part of the supreme law of the land.<sup>372</sup>

Congress could preempt all state laws purporting to regulate alien ownership of real property if it chose to do so. Under the Commerce Clause of the United States Constitution,<sup>373</sup> Congress has extensive powers to regulate both interstate commerce and commerce with foreign countries. This power no doubt encompasses the power to enact a comprehensive federal plan of alien land ownership.<sup>374</sup>

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<sup>367</sup> E.g., *Ambach v. Norwick*, 441 U.S. 68, 79-81 (1979) (holding a New York statute denying resident aliens the right to be employed as elementary and secondary school teachers to be constitutional); *Foley v. Connellie*, 435 U.S. 291, 296-300 (1978) (holding a New York statute denying resident aliens the right to be employed as police officers to be constitutional).

<sup>368</sup> U.S. CONST. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .").

<sup>369</sup> See David A. Williams, Note, *Alien Ownership of Kansas Farmland: Can It Be Prohibited?*, 20 WASHBURN L.J. 514, 526 (1981).

<sup>370</sup> *Anderson Nat'l Bank v. Reeves*, 172 S.W.2d 575, 576 (Ky. 1943) (holding that a statute allowing dormant bank accounts to escheat to the state did not violate the Fourteenth Amendment), *aff'd sub nom. Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944).

<sup>371</sup> Op. Ky. Att'y Gen. 81-248 (1981).

<sup>372</sup> U.S. CONST. art. VI, cl. 2.

<sup>373</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>374</sup> See Williams, *supra* note 369, at 528.

## IV. CONDUCT AFFECTING INHERITANCE RIGHTS

Generally, neither moral unworthiness nor misconduct, even of a criminal nature, disqualifies an heir from inheritance. Thus, a scoundrel or a thief may succeed to the decedent's property. Kentucky, however, bars succession to the property of the decedent when the claimant has engaged in certain statutorily defined conduct.

*A. Homicide*

Prior to the adoption of KRS section 381.280, Kentucky case law barred an insurance policy beneficiary who had feloniously killed the insured, regardless of the motive, from taking the proceeds of the policy.<sup>375</sup> The rationale was that the beneficiary's wrongful act was a fraud upon a contract right. The case law also evidenced an unwillingness to permit testate inheritance by a will beneficiary who murdered the testator.<sup>376</sup> An intestate taker, however, who murdered the decedent did not forfeit the right to take the victim's property in intestacy.<sup>377</sup> The justification for this shocking rule was that intestate succession is controlled entirely by statute. Since the statute on descent and distribution did not bar a murdering heir or distributee from intestate inheritance, the court would not engraft a forfeiture provision onto the statutes.

In 1940, the Kentucky legislature adopted KRS section 381.280,<sup>378</sup> which codified the case law prohibitions against inheritance by a murdering will or insurance beneficiary. The statute also expanded the prohibition to include a murdering intestate taker or a murdering joint tenant with right of survivorship. The statute provides that a spouse, intestate taker, will beneficiary, joint tenant with right of survivorship, or beneficiary under any insurance policy who is convicted of feloniously killing the decedent forfeits all interest in and to the decedent's property.<sup>379</sup> The forfeited property interest "descends to the decedent's other heirs at law, unless otherwise disposed of by the decedent."<sup>380</sup>

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<sup>375</sup> *National Life Ins. Co. of Montpelier v. Hood's Adm'r*, 94 S.W.2d 1022, 1023 (Ky. 1936) (disallowing a wife who killed her husband and was convicted of the felony from collecting the proceeds of the policy).

<sup>376</sup> *Eversole v. Eversole*, 185 S.W. 487, 488 (Ky. 1916) (implying in dicta that one who kills a testator for the purpose of obtaining the testator's property should not receive the property).

<sup>377</sup> *Id.*

<sup>378</sup> 1940 Ky. Acts ch. 97.

<sup>379</sup> KY. REV. STAT. ANN. § 381.280 (Michie/Bobbs-Merrill 1972).

<sup>380</sup> *Id.*

There are two prerequisites to the operation of the statute's forfeiture provision: (1) the murderer must be convicted of the homicide, and (2) the conviction must be for a felony. The criminal conviction requirement restricts the effectiveness of the statute. For example, in the case of a murder-suicide, the statutory prerequisites to forfeiture cannot be satisfied as there cannot be a conviction of the wrongdoer because of the suicide. In such a case, the statute is inapplicable.<sup>381</sup> Similarly, if the murderer is prosecuted, but acquitted, the forfeiture provision does not apply.

This anomalous situation arises because the policy considerations and the burden of proof in a criminal prosecution are different from those at work in the civil context. In the civil context it is axiomatic that a wrongdoer should not profit from the wrong committed, and the wrongdoing need only be established by a preponderance of the evidence.<sup>382</sup> Succession to property is a civil, not a criminal, matter. Therefore, a probate court should be able to determine by a preponderance of the evidence that a felonious killing has occurred and bar the wrongdoer from succession to the property of the victim even absent a criminal conviction or in spite of an acquittal.<sup>383</sup>

The statutory requirement that the wrongdoer must be convicted of a *felony* rightfully precludes forfeiture if the decedent's life is taken in self-defense<sup>384</sup> or under circumstances which result only in a misdemeanor offense.<sup>385</sup> Neither situation involves wrongdoing of such a nature as would warrant the forfeiture of inheritance rights. However, the statute sweeps too broadly because forfeiture is not limited to instances of *intentional* felonious killings. As compared to a person who intentionally or wantonly and recklessly causes the death of the decedent, a person who is guilty of an accidental manslaughter killing of the decedent is not very culpable. Nevertheless, because manslaughter is a felony, such a person presently comes within the statute's forfeiture provision.<sup>386</sup>

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<sup>381</sup> *Cowan v. Pleasant*, 263 S.W.2d 494, 495 (Ky. 1954) (allowing estate of husband who immediately committed suicide after killing his wife to take half of wife's estate).

<sup>382</sup> *National Life Ins. Co. of Montpelier v. Hood's Adm'r*, 94 S.W.2d 1022, 1023 (Ky. 1936).

<sup>383</sup> See UNIF. PROBATE CODE § 2-803 cmt., 8 U.L.A. 172 (1982).

<sup>384</sup> *Metropolitan Life Ins. Co. v. Prater*, 508 F. Supp. 667 (E.D. Ky. 1981) (allowing husband who killed wife in self-defense to collect the proceeds of an insurance policy).

<sup>385</sup> *Commercial Travelers Mut. Accident Ass'n v. Witte*, 406 S.W.2d 145, 149 (Ky. 1966) (allowing wife convicted of misdemeanor of involuntary manslaughter to collect insurance proceeds from a policy on husband's life).

<sup>386</sup> The forfeiture statute withstood state constitutional challenges in *Wilson v. Bates*. See *supra* notes 26-37 and accompanying text.

The courts have characterized KRS section 381.280 as being "in the nature of a statutory exception to the statute[s] of descent and distribution."<sup>387</sup> Its forfeiture provision only applies in situations involving postmortem succession to property. Thus, the court found the statute to be irrelevant in determining whether a wrongful death action could be brought against a killer who was the spouse of the victim but who had not been convicted of the crime.<sup>388</sup>

The forfeited property interest of a killer whom the statute bars from sharing in the victim's estate must be disposed of in some manner. The statute provides that the interest descends to the victim's other heirs unless otherwise disposed of by the decedent.<sup>389</sup> In the situation of intestate and testate succession, the courts have interpreted the statute to mean that the forfeited property passes as if the murderer were not alive at the victim's death.<sup>390</sup> The courts have also limited the application of the statute to the one who committed the wrongful act. Thus, in *Bates v. Wilson*<sup>391</sup> a son was convicted of killing both of his parents, and his daughter took his share of his parents' estates.<sup>392</sup> The child of the wrongdoer in *Bates* inherited as if her father had predeceased his parents because the statute does not prohibit the innocent child of the wrongdoer from inheriting the share that the murderer would have taken but for the murder and the conviction.

In *Wilson v. Bates*,<sup>393</sup> the companion case to *Bates*, the court determined that the murdering son never acquired any interest in his parents' estate. Consequently, his attempt, prior to his conviction, to mortgage a one-half interest in the victims' property was a nullity. Conviction is merely the judicial determination that the murderer has forfeited all right to inherit from the victim. According to the court, the murderer actually forfeits the right to inherit from the victim immediately prior to the death of the victim.<sup>394</sup> No part of the victim's estate ever vests in the wrongdoer.

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<sup>387</sup> *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 672 (Ky. 1967).

<sup>388</sup> *Id.*

<sup>389</sup> KY. REV. STAT. ANN. § 381.280 (Michie/Bobbs-Merrill 1972).

<sup>390</sup> *Bates v. Wilson*, 232 S.W.2d 837, 838 (Ky. 1950) (treating son who was convicted of feloniously murdering his parents as though he had predeceased his parents); *Pierce v. Pierce*, 216 S.W.2d 408, 408 (Ky. 1948) (treating son who was convicted of feloniously killing his father as though he had never been born).

<sup>391</sup> 232 S.W.2d 837 (Ky. 1950).

<sup>392</sup> *Id.* at 838.

<sup>393</sup> 231 S.W.2d 39 (Ky. 1950).

<sup>394</sup> *Id.* at 41.



In *Pierce v. Pierce*,<sup>395</sup> another case involving a son who was convicted of killing his parent, the court found that the statute operates only as a bar to the son's right to *inherit* his father's property. It did not forever bar the convicted murderer from acquiring title to the victim's property from some other source.<sup>396</sup> Because the son was treated as if he were dead at the death of his father, the father's property passed to his father (the murderer's paternal grandfather). Later, the grandfather made a contract which purported to require the grandfather to sell the inherited land to his grandson, the convicted killer of the decedent. The court determined that KRS section 381.280 did not make the contract unenforceable, even though by the contract the murderer would acquire title to the same property that he would have inherited but for the murder.<sup>397</sup>

KRS section 381.280 also bars a convicted murderer from taking as the beneficiary of an insurance policy on the victim's life. However, by barring the beneficiary from taking the insurance proceeds, the statute does not relieve the insurer of its contractual obligation. The insurer must pay those who are next entitled to the insurance proceeds upon the failure of the named beneficiary to take.<sup>398</sup>

In *National Life Insurance Co. of Montpelier, Vermont v. Hood's Administrator*,<sup>399</sup> a prestatute case, the decedent had not named an alternative beneficiary. Consequently, the insurance proceeds became an asset of the insured's estate and passed as personalty to the insured's personal representative. The court expressly refused to decide whether the murderer, the insured's wife, could share in the distribution of the proceeds after they were paid over to the deceased's personal representative.<sup>400</sup> At the time of the decision a convicted murderer could inherit in intestacy from the victim.<sup>401</sup> Now, however, the statute specifically bars intestate inheritance by a convicted murderer of the decedent.<sup>402</sup> The beneficiary of an insurance policy on the life of the insured who is convicted of killing the insured forfeits all right to share in the proceeds of the insurance as either a beneficiary under the policy or an intestate taker.<sup>403</sup>

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<sup>395</sup> 216 S.W.2d 408 (Ky. 1948).

<sup>396</sup> *Id.* at 409.

<sup>397</sup> *Id.*

<sup>398</sup> *First Ky. Trust Co. v. United States*, 737 F.2d 557, 560-61 (6th Cir. 1984).

<sup>399</sup> 94 S.W.2d 1022 (Ky. 1936).

<sup>400</sup> *Id.* at 1025.

<sup>401</sup> See *Eversole v. Eversole*, 185 S.W. 487, 488 (Ky. 1916).

<sup>402</sup> KY. REV. STAT. ANN. § 381.280 (Michie/Bobbs-Merrill 1972).

<sup>403</sup> *Id.*

In *First Kentucky Trust Company v. United States*,<sup>404</sup> a federal case applying Kentucky law, a husband convicted of killing his wife was the designated beneficiary on four insurance policies on the life of the wife. The statute, however, expressly barred the husband from directly taking the insurance proceeds. The alternative beneficiaries on the policies were the husband's executors or administrators.<sup>405</sup> According to Kentucky law, if the beneficiary of an insurance policy predeceases the insured, the proceeds go to the alternative beneficiaries. Moreover, Kentucky case law treats a murdering insurance beneficiary as if she or he had predeceased the insured. Nonetheless, the court determined that the proceeds could not pass to the alternative beneficiaries because the alternative beneficiaries were the killer's personal representatives and the murderer cannot share in any manner in the proceeds. Instead of being forfeited to the company on the failure of both the primary and alternative beneficiaries, the proceeds of the policies became payable to the estate of the insured.<sup>406</sup>

Even though the primary beneficiary on an insurance policy is convicted of killing the insured, if the insurance policy is not valid, the alternative beneficiaries on the policy or the estate of the insured will not take the proceeds of the policy. In *Coyler's Administrator v. New York Life Insurance Company*,<sup>407</sup> the beneficiary procured a life insurance policy on the insured's life. At the time that the policy was obtained, the beneficiary had already decided to murder the insured. When the beneficiary thereafter murdered the insured, neither the beneficiary nor the estate of the insured recovered on the policy because a policy obtained under such circumstances is "void from its inception."<sup>408</sup>

Kentucky's courts have struggled with the problem of how to allocate rights in property held in a tenancy by the entirety when one tenant murders the other and thereby becomes the surviving tenant. A tenancy by the entirety is a unique form of concurrent ownership which may exist only between spouses. Such a tenancy creates one indivisible estate in both spouses. Upon the death of the first spouse, the estate continues in the survivor alone.<sup>409</sup> Also, each spouse has a contingent right of survivorship in the property during the joint, married lives of the spouses. Each spouse can unilaterally convey or encumber only her or his

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<sup>404</sup> 737 F.2d 557 (6th Cir. 1984).

<sup>405</sup> *Id.* at 559-60.

<sup>406</sup> *Id.* at 561.

<sup>407</sup> 188 S.W.2d 313 (Ky. 1945).

<sup>408</sup> *Id.* at 314.

<sup>409</sup> ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 5.5 (1984).

individual contingent right of survivorship.<sup>410</sup> The transferee of a spouse's contingent right of survivorship does not take a present right of possession. The transferee has only a right to possess the property if the spouse who made the transfer ultimately is the surviving tenant by the entirety.<sup>411</sup>

The first case involving the killing of one tenant by the entirety by the other tenant, *Cowan v. Pleasant*,<sup>412</sup> did not require the court to apply the forfeiture provision in KRS section 381.280. However, the court purported to rely on the underlying justification for the statute in reaching its decision. The husband in *Cowan* had killed his wife and then committed suicide. He could not be convicted of the felony for taking his wife's life, so the statute was not operative. Although the court could find only limited support for its decision, it treated the murder as transforming the tenancy by the entirety, with its contingent right of survivorship, into a tenancy in common.<sup>413</sup> Each tenant in common has an absolute right to dispose of her or his undivided fractional interest in the property either inter vivos by deed or at death.<sup>414</sup> The court divided the property held by the entirety equally between the estate of the victim and the estate of the murderer. The court's rationale was that this result was in keeping with the legislature's intention when enacting KRS section 381.280 not to punish a child whose parent committed a wrongful act of murder.<sup>415</sup> Supposedly, splitting the property between the two spouses' estates avoided punishing the innocent children of the murderer.

What the *Cowan* decision ignores is the civil maxim that a wrongdoer should not be permitted to profit from their own wrong.<sup>416</sup> Until the moment that the husband killed his wife, he had no guarantee that he would ever have an individual interest in the property. He had to survive the co-tenant, his wife, in order to take the property as his own individual property. By the wrongful act of murder, the court expanded his contingent right of survivorship into an undivided one-half interest in the land, which the murderer could then dispose of during his life or at his

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<sup>410</sup> See RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY ¶ 622[4] (1993).

<sup>411</sup> See *Hoffman v. Newell*, 60 S.W.2d 607, 609 (Ky. 1932) (seminal case concerning tenancies by the entirety).

<sup>412</sup> 263 S.W.2d 494 (Ky. 1954).

<sup>413</sup> *Id.* at 495.

<sup>414</sup> CUNNINGHAM ET AL., *supra* note 409, § 5.2.

<sup>415</sup> *Cowan*, 263 S.W.2d at 495-96.

<sup>416</sup> See *National Life Ins. Co. of Montpelier v. Hood's Adm'r*, 94 S.W.2d 1022, 1023 (Ky. 1936).

death.<sup>417</sup> If the court had applied the rationale of earlier decisions applying KRS section 381.280, it would have treated the husband as if he had predeceased his wife.<sup>418</sup> The victim would become the surviving tenant by the entirety by application of this legal fiction, and her estate would have taken the entire interest in the property by virtue of her survivorship.

The *Cowan* decision also does violence to the express language of KRS section 381.280. The statute states that a convicted murderer "forfeits *all* interest in and to the property of the decedent including any interest [the murderer] would receive as surviving joint tenant."<sup>419</sup> The property interest thus forfeited should descend to the decedent's other heirs.

More recent court decisions continue to treat the murder of one tenant by the entirety by the other as a conversion of the estate into a tenancy in common without a right of survivorship. The Kentucky Court of Appeals permitted a convicted, murdering tenant by the entirety to retain one-half of the proceeds of a casualty insurance policy on property the murderer and the victim had held by the entirety. The court thought that "equity" dictated that the property be divided equally between the husband or his heirs and the heirs of the murdered wife.<sup>420</sup> It is difficult to understand what equitable considerations support giving a husband who feloniously kills his wife, an innocent party, a half interest in the property. His wrongful act unilaterally destroyed his wife's ability to take the whole as the surviving tenant—a right she had until she was killed.

In *Peyton v. Young*<sup>421</sup> the Kentucky Supreme Court reached a correct result despite misplaced discussion of the statutory and case law concerning murdering tenants by the entirety. In *Peyton*, a wife and husband had purchased their home as tenants by the entirety. The husband subsequently encumbered his contingent right of survivorship by a mortgage in which his wife did not join. The wife and husband divorced, and the husband conveyed his interest in the house to his former spouse. Shortly after the conveyance, the husband killed his former spouse and himself. The court held that only one-half of the property was encumbered by the mortgage given by the husband.<sup>422</sup>

*Peyton*, however, was not a case of murdering tenants by the entirety or murdering joint tenants with right of survivorship. When tenants by the entirety divorce, one essential element of the tenancy—spousal unity—is

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<sup>417</sup> See *Cowan*, 263 S.W.2d at 495.

<sup>418</sup> See, e.g., cases cited *supra* note 390.

<sup>419</sup> KY. REV. STAT. ANN. § 381.280 (Michie/Bobbs-Merrill 1972).

<sup>420</sup> *Heuser v. Cohen*, 655 S.W.2d 9, 11 (Ky. Ct. App. 1982).

<sup>421</sup> 659 S.W.2d 205 (Ky. 1983).

<sup>422</sup> *Id.* at 207.

destroyed.<sup>423</sup> On divorce, the parties become tenants in common, each having an individual, undivided one-half interest in the property which either can sell or encumber.<sup>424</sup> The prior mortgage encumbered the husband's interest in the tenancy by the entirety at the time of the divorce, and the encumbrance continued when his interest in the property was expanded by the divorce. When he transferred his interest to his former spouse, he only had an encumbered interest to transfer.<sup>425</sup> That he later killed himself and his former spouse is irrelevant to the property question concerning the presence or absence of an encumbrance on the property in the former spouse's hands. Neither the statutory provision on the rights of murdering joint tenants<sup>426</sup> nor the case law interpreting that statute<sup>427</sup> is applicable because the parties were no longer joint tenants at the time of the murder-suicide. Indeed, the parties were not concurrent owners of any sort. By virtue of the divorce and property transfer, the former wife was the sole owner of the property, one-half of which was encumbered by her former husband's prior mortgage.

Most recently, in *First Kentucky Trust Company v. United States*,<sup>428</sup> the United States Court of Appeals for the Sixth Circuit reached a far more equitable result by finding that a tenant by the entirety who is convicted of a felony for taking the life of the other tenant is barred from asserting any interest as the surviving tenant. The court, however, incorrectly stated that this result was required under KRS section 381.280.<sup>429</sup> As demonstrated above,<sup>430</sup> Kentucky case law directs that only half of the property held by the entirety belongs to the estate of the victim. The other half is the property of the killer. The Sixth Circuit incorrectly included in the victim's estate the whole value of the property held by the victim and her murderer as tenants by the entirety.

### B. Adultery

Until Parliament enacted a statute prohibiting inheritance by an adulterous wife,<sup>431</sup> adultery was not a bar to a wife's dower at the common law.<sup>432</sup>

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<sup>423</sup> The five unities essential for a tenancy by the entirety are time, title, interest, possession and person. CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 218 (2d ed. 1988).

<sup>424</sup> POWELL & ROHAN, *supra* note 410, § 624.

<sup>425</sup> See *Peyton*, 659 S.W.2d at 207.

<sup>426</sup> KY. REV. STAT. ANN. § 381.280 (Michie/Bobbs-Merrill 1972).

<sup>427</sup> E.g., *Cowan v. Pleasant*, 263 S.W.2d 494 (Ky. 1954).

<sup>428</sup> 737 F.2d 557 (6th Cir. 1984).

<sup>429</sup> *Id.* at 560.

<sup>430</sup> See *supra* notes 412-27 and accompanying text.

<sup>431</sup> Stat. of Westminster II, 1285, 13 Edw. 1, ch. 34 (Eng.).

<sup>432</sup> See generally *Baldwin v. Cook*, 23 S.W.2d 601 (Ky. 1930) (providing an excellent

KRS section 392.090(2) continues the English statutory bar to inheritance by an adulterous wife and expands it to include adulterous husbands. The statute provides that if either spouse voluntarily leaves the other and lives in adultery, the adulterous spouse forfeits all right and interest in the property of the other.<sup>433</sup> Every case involving the application of this statute involves the claim that a wife is barred from inheritance in her husband's estate because of her adulterous conduct. Either Kentucky husbands are uncommonly virtuous and faithful or a double standard is at work.

There are two prerequisites to the operation of the statute's forfeiture provision: the surviving spouse must have (1) voluntarily "left" the other and (2) lived in adultery.<sup>434</sup> In a non-Kentucky case, a wife was not barred from inheriting because she had lived in adultery only after her husband had deserted her.<sup>435</sup> Merely leaving is not enough to disqualify the spouse who leaves; the spouse must also live in adultery. In one case,<sup>436</sup> a wife who left her husband two years before his death and lived with her mother in another town without procuring a divorce was not barred from taking her distributable share in her husband's estate. Even though the separation may have been intended as permanent, there could not be a forfeiture absent any adulterous conduct.<sup>437</sup>

Although the terms of the statute require that there be a leaving by the adulterous spouse, there can be a forfeiture even if the adulterous spouse does not physically leave the home. Thus, the statute barred a wife from sharing in her husband's estate when she lived openly in adultery in the family home after her husband was confined to a mental institution.<sup>438</sup> In a later case, *Ferguson v. Ferguson*,<sup>439</sup> the allegation of the wife's adulterous conduct while living with her husband was not proved. However, the court reaffirmed the principle that even a spouse who continues to live with the other spouse forfeits any interest in the other spouse's estate by engaging in adulterous conduct.<sup>440</sup>

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history of Kentucky's adultery statute).

<sup>433</sup> KY. REV. STAT. ANN. § 392.090(2) (Michie/Bobbs-Merrill 1984); see, e.g., *Ferguson v. Ferguson*, 156 S.W. 413 (Ky. 1913); *Goss v. Forman*, 12 S.W. 387 (Ky. 1885).

<sup>434</sup> *Id.*

<sup>435</sup> *Beaty v. Richardson*, 34 S.E. 73, 76 (S.C. 1899); see also *Gordon v. Dickinson*, 23 N.E. 439, 440 (Ill. 1890).

<sup>436</sup> *Meyers' Adm'r v. Meyers*, 50 S.W.2d 81 (Ky. 1932).

<sup>437</sup> *Id.* at 83.

<sup>438</sup> *McQuinn v. McQuinn*, 61 S.W. 358, 360 (Ky. 1901).

<sup>439</sup> 156 S.W. 413 (Ky. 1913).

<sup>440</sup> *Id.* at 414. *Contra* *Sergeant v. North Cumberland Mfg. Co.*, 66 S.W. 1036, 1037

The requirement that the spouse must "live in adultery" has been subject to court interpretation. Although one act of adultery is probably not sufficient to cause a forfeiture of inheritance rights,<sup>441</sup> constantly living in adultery is not a prerequisite to forfeiture. In *Goss v. Forman*<sup>442</sup> a woman left her husband's house approximately two months before he died. Although she did not live with a man after leaving her husband, she did have sexual intercourse on several occasions with another man. The court found that the wife forfeited her inheritance rights in her husband's estate. The court determined that it was not necessary that the wife should live constantly with one man in adultery during her abandonment of her husband. Having sexual intercourse with any man or men periodically, when it was convenient, or when the opportunity was afforded constituted "living in adultery" within the meaning of the statute.<sup>443</sup>

The determination of whether or not a spouse has committed adultery is a factual question within the province of the trial court that generally will not be disturbed on appeal.<sup>444</sup> Evidence admissible in making this determination includes the testimony of the spouse's alleged paramour. However, the court has stated on two different occasions that such testimony is to be viewed with suspicion and acted upon with extreme caution.<sup>445</sup> The court's admonitions concerning the reliability of such evidence was predicated on the fact that the witness in each instance was a willing, or voluntary, witness. The court thought that any man who would voluntarily by his testimony "destroy the wife, affix a stain to her children and family,"<sup>446</sup> and admit to conduct degrading and blameable to himself was not to be believed.<sup>447</sup> Presumably, if the witness is subpoenaed and is unwilling to testify, the testimony is not viewed with such suspicion.

The presumption against the reliability of the paramour's testimony was actually unnecessary in these two cases. There were numerous other indicia of the unreliability of the witness' testimony. In both instances the

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(Ky. 1902).

<sup>441</sup> Cf. *Booth v. Booth*, 12 Ky. L. Rep. 988, 988 (1891) (holding that a single act of adultery by the husband does not entitle the wife to a divorce on the ground of adultery under an earlier statute).

<sup>442</sup> 12 S.W. 387 (Ky. 1885).

<sup>443</sup> *Id.* at 389; see also *Bond v. Bond's Adm'r*, 150 S.W. 363 (Ky. 1912) (holding that periodic adulterous conduct caused forfeiture of the wife's dower rights).

<sup>444</sup> See *Ferguson*, 156 S.W. at 415; *Bond*, 150 S.W. at 364.

<sup>445</sup> *Ferguson*, 156 S.W. at 415; *Bond*, 150 S.W. at 364.

<sup>446</sup> *Bond*, 150 S.W. at 364.

<sup>447</sup> *Id.*

testimony of the self-proclaimed paramour was uncorroborated. In both cases others totally discredited the witnesses' character for truth and sobriety, and the alleged paramours' stories of their relationships with the surviving wives were highly improbable factually.<sup>448</sup>

If the statute's forfeiture provision is triggered, it not only bars a spouse from asserting dower rights, but it also bars a spouse's claim for the homestead<sup>449</sup> and personalty exemptions.<sup>450</sup> Although there is no case on point, it should also work to bar an adulterous spouse from taking as the decedent's intestate taker pursuant to KRS section 391.010(4) when the decedent is not survived by any issue, parents, siblings or issue of siblings. Because the statute has been interpreted to bar only rights to intestate succession to the decedent's property, it does not bar a devise or bequest in a will to the adulterous spouse of the testator.<sup>451</sup>

Since KRS section 392.090(2) only provides for forfeiture of any right or interest in the property of the nonadulterous spouse, the statute does not bar an adulterous spouse who is the beneficiary of a life insurance policy on the deceased spouse's life from taking the proceeds of the policy.<sup>452</sup> This is true whether the policy was taken out and paid for by the adulterous spouse or by the deceased spouse. By statute, an insurance policy procured and paid for by one spouse on the life of the other spouse is the separate property of the spouse who procured it.<sup>453</sup> The insured spouse has no interest in the policy or its proceeds that would be subject to forfeiture under KRS section 392.090(2). Even if the insured spouse procured and paid for the policy, there is no forfeiture when the beneficiary spouse commits adultery. The insured spouse could have changed the beneficiary designation during the insured's lifetime. If this power is not exercised, upon the death of the insured, title to the proceeds vests, by statute, in the beneficiary.<sup>454</sup> The proceeds never form any part of the insured's estate. Therefore, they are not a property interest of the decedent that is forfeited by a surviving spouse who commits adultery.

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<sup>448</sup> *Ferguson*, 156 S.W. at 414-15; *Bond*, 150 S.W. at 363.

<sup>449</sup> *Davis v. Calvert*, 38 S.W. 884, 885 (Ky. 1897) (holding that a wife is not entitled to dower or homestead in her husband's land as against the right of a third person to compensation for supporting the husband in his last illness).

<sup>450</sup> *Bond*, 150 S.W. at 363.

<sup>451</sup> *Baldwin v. Cook*, 23 S.W.2d 601, 605 (Ky. 1930).

<sup>452</sup> *Bradley v. Bradley's Adm'r*, 198 S.W. 905, 908 (Ky. 1917).

<sup>453</sup> KY. REV. STAT. ANN. § 304.14-340 (Michie/Bobbs-Merrill 1988) (rights of married woman in life insurance).

<sup>454</sup> *Id.* § 304.14-300 (exemption of proceeds of life insurance); *id.* § 304.14-320 (exemption of proceeds of group insurance).



KRS section 392.090(2) does not bar a spouse's ability to recover for the wrongful death of the other spouse even though the surviving spouse left the decedent and lived in adultery.<sup>455</sup> A wrongful death recovery goes directly to those designated as beneficiaries under Kentucky's wrongful death statute.<sup>456</sup> The recovery is for the designated beneficiaries and never becomes part of the decedent's estate. Therefore, it is not a property interest of the decedent, and it is not forfeited under the statute.

Even if a spouse voluntarily leaves the other and lives in adultery, the statute's forfeiture provision can be avoided. If the spouses later become reconciled and live together as spouses, the statute's forfeiture provision becomes inapplicable.<sup>457</sup>

### C. Bigamy

Although there are no reported cases construing it, KRS section 392.100 provides that a person convicted of bigamy forfeits any claim to dower in the estate of the first spouse.<sup>458</sup> Upon conviction, the first spouse is endowed with a life estate in one-third of the real estate of the bigamous spouse as well as an absolute interest in one-third of the bigamous spouse's personalty. The property is allotted and recovered in the same manner as dower.<sup>459</sup>

A person is guilty of the criminal offense of bigamy if she or he enters into a subsequent marriage knowing that she or he or the other party is still married to another person.<sup>460</sup> As the knowledge of the earlier, untermiated marriage is the essential element of the offense, either party to the subsequent marriage may be convicted. Bigamy is also committed if the parties to a bigamous marriage in another state later cohabitate in Kentucky.<sup>461</sup> It is a defense to a bigamy prosecution that the accused believed she or he was legally eligible to marry.<sup>462</sup>

If there has been a bigamous marriage, but there has not been any bigamy conviction, intestate inheritance rights of the various marriage participants in each other's estates may nonetheless have to be deter-

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<sup>455</sup> *Napier's Adm'r v. Napier's Adm'r*, 275 S.W. 379, 380 (Ky. 1925).

<sup>456</sup> KY. REV. STAT. ANN. § 411.130 (Michie/Bobbs-Merrill 1992).

<sup>457</sup> KY. REV. STAT. ANN. § 392.090(2) (Michie/Bobbs-Merrill 1984).

<sup>458</sup> See *id.* at § 392.100 (supplying no cases in the annotated section).

<sup>459</sup> *Id.* § 392.100.

<sup>460</sup> *Id.* § 530.010(1)(a).

<sup>461</sup> *Id.* § 530.010(1)(b).

<sup>462</sup> *Id.* § 530.010(2).

mined. KRS section 392.100 does not provide a mechanism for allocating the inheritance claims of multiple surviving "spouses" in the estate of a bigamous spouse.<sup>463</sup> The statute also does not provide any express bar to inheritance claims by a nonconvicted bigamous spouse in the estates of either of the bigamous spouse's marriage partners. However, the bigamous spouse would be barred from inheriting from the estate of the first spouse under KRS section 392.090(2), the adultery statute.<sup>464</sup>

Logically, if the second marriage is invalid and the bigamous spouse survives the second spouse, the bigamous spouse is not the surviving spouse of the second spouse and has no claim to a share in that estate. Similarly, if the bigamous spouse dies survived by both the first and second spouses and the second marriage is invalid, the second spouse is not the surviving spouse. The first spouse would be the party entitled to inherit as the surviving spouse of the deceased bigamous spouse.

This analysis, though correct, hinges on whether the second marriage is invalid. KRS section 403.120 provides the method for adjudicating the validity of a marriage in Kentucky.<sup>465</sup> If the marriage is allegedly invalid as bigamous, its validity may only be attacked by one of the parties to the marriage within one year after the petitioner obtains knowledge of the bigamous nature of the marriage.<sup>466</sup> A collateral attack by a third party is not permitted. Only the bigamous spouse and the second spouse, the parties to the second marriage, may attack the validity of their marriage. In a contest between the first spouse and the second spouse for the right to inherit as the surviving spouse of the bigamous spouse, the statute precludes any attack by the first spouse on the second marriage as bigamous. This is because the first spouse is not a party to the second marriage.

Although the case did not involve competing claims by more than one alleged spouse of the decedent, the court in *Ferguson v. Ferguson* applied the statutory bar to collateral attacks on the validity of a marriage alleged to be bigamous.<sup>467</sup> A son of the decedent by the decedent's first wife contested the appointment of the decedent's second wife as administrator of the estate. Because the decedent had married the second

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<sup>463</sup> See *id.* § 392.100.

<sup>464</sup> *Id.* § 392.090(2). That statute provides that if a spouse voluntarily leaves her or his spouse and lives in adultery, the adulterous spouse is barred from inheriting from the nonadulterous spouse's estate. See *supra* notes 432-57 and accompanying text (discussing the operation and interpretation of KRS § 392.090(2)).

<sup>465</sup> KY. REV. STAT. ANN. § 403.120 (Michie/Bobbs-Merrill 1984).

<sup>466</sup> *Id.* § 403.120.

<sup>467</sup> 610 S.W.2d 925 (Ky. Ct. App. 1980).

wife prior to obtaining a final decree of divorce from his first spouse, the second marriage was bigamous when contracted. However, relying on KRS section 403.120, the court determined that the son had no standing to collaterally attack the validity of the second marriage.<sup>468</sup> Therefore, he could not contest the second wife's status as the decedent's surviving spouse nor her right to be appointed administrator of the decedent's estate.

In support of its decision, the court reasoned that collateral attacks on marriages are unfair as they exact economic penalties from the surviving spouse by denying inheritance rights as well as social security and other benefits.<sup>469</sup> This is a valid consideration in a *Ferguson*-type case. The decedent and his second wife had been married for ten years prior to his death. The first marriage was terminated by divorce six days after the second marriage was contracted.<sup>470</sup> No one, other than the second wife, could claim to be the decedent's surviving spouse. In a situation where two people are claiming to be the decedent's surviving spouse, however, the equities are not so clearly in favor of precluding a collateral attack on the second marriage.

Kentucky patterned KRS section 403.120 on Section 208 of the Uniform Marriage and Divorce Act.<sup>471</sup> However, Kentucky omitted crucial language of the Uniform Act authorizing limited collateral attacks on bigamous marriages. Kentucky also significantly shortened the period during which the parties to the second marriage may attack the validity of an alleged bigamous marriage.<sup>472</sup> The Uniform Act permits a collateral attack on a bigamous marriage by the first spouse or a child of either party as well as permitting a direct attack by the parties themselves.<sup>473</sup>

A choice of two alternative statutes of limitation are set out in the Uniform Act, but Kentucky enacted neither of them. One statute of limitation permits a collateral attack at any time prior to the death of one of the parties to the subsequent marriage.<sup>474</sup> The other permits a collateral attack at any time not to exceed five years following the death of

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<sup>468</sup> *Id.* at 927.

<sup>469</sup> *Id.* at 926.

<sup>470</sup> *Id.*

<sup>471</sup> UNIF. MARRIAGE AND DIVORCE ACT § 208, 9A U.L.A. 170 (1987).

<sup>472</sup> Compare KY. REV. STAT. ANN. § 403.120 (providing a one year period after a party learns of the prohibited marriage) with UNIF. MARRIAGE AND DIVORCE ACT § 208(c) Alternative A (allowing a challenge to the marriage at any time prior to the death of one of the parties) and *id.* § 208(a) Alternative B (allowing a challenge to the marriage for a five year period after the death of either party).

<sup>473</sup> *Id.* § 208 Alternative A(c) and Alternative B(c).

<sup>474</sup> *Id.* § 208 Alternative A(c).

either party.<sup>475</sup> Under the first alternative, the first spouse cannot mount a postmortem collateral attack and is precluded from inheriting if the collateral attack is not brought before the death of the bigamous spouse. The second alternative, in contrast, does authorize a postmortem determination of the validity of the second marriage.

Unlike the alternatives in the Uniform Act, KRS section 403.120 never permits a collateral attack by the first spouse or a child of the bigamous spouse.<sup>476</sup> In Kentucky, the first spouse can never obtain a declaration of invalidity of the second marriage to protect her or his inheritance rights in the estate of the bigamous spouse. A law which permits one spouse to unilaterally defeat the other spouse's inheritance rights by the wrongful act of bigamy is not very easily justified.

#### *D. Divorce*

By statute, an absolute divorce bars all claims of either spouse to the property of the other spouse upon the former spouse's death.<sup>477</sup> The surviving former spouse cannot claim dower in any property that the deceased former spouse died owning.

Since a unilateral conveyance of real property by one spouse could not defeat the other spouse's dower rights if the spouses had remained married, the surviving spouse would have been entitled to a life estate in one-third of the real property conveyed away.<sup>478</sup> However, the divorce subsequent to the unilateral conveyance extinguishes the nonconsenting spouse's inchoate dower claim in the property.<sup>479</sup> After an absolute divorce, the surviving former spouse also has no claim to any distributive share<sup>480</sup> of, or homestead<sup>481</sup> in, the deceased former spouse's estate. The only time a former spouse has any claim in the estate of a deceased former spouse is if such an award was made to the surviving spouse in the divorce action.<sup>482</sup>

A valid divorce is the essential prerequisite to the operation of the statute's absolute bar to inheritance rights in the deceased former spouse's

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<sup>475</sup> *Id.* § 208 Alternative B(c).

<sup>476</sup> *See* KY. REV. STAT. ANN. § 403.120 (Michie/Bobbs-Merrill 1984).

<sup>477</sup> *Id.* § 392.090(1).

<sup>478</sup> *Id.* § 392.020.

<sup>479</sup> *Bromley v. McCall*, 192 S.W. 507, 508 (Ky. 1917); *McKean v. Brown*, 83 Ky. Op. 208, 209 (1885).

<sup>480</sup> *Bromley*, 192 S.W. at 507.

<sup>481</sup> *Skinner v. Walker*, 34 S.W. 233, 235 (Ky. 1896).

<sup>482</sup> *Sapp v. Sapp*, 193 S.W.2d 443, 444 (Ky. 1946).

estate. If one spouse lives apart from the other spouse without procuring a divorce, that spouse's share in the other spouse's estate is not barred. This is so even if the spouse intended the separation to be permanent.<sup>483</sup>

The divorce need not have been obtained in Kentucky. If the divorce was validly granted in another jurisdiction, the statute's inheritance bar precludes any claim by the divorced surviving spouse to inheritance rights in the estate of the deceased former spouse.<sup>484</sup>

If both spouses consent, Kentucky still permits divorce from bed and board in lieu of an absolute divorce.<sup>485</sup> Such a divorce is an anachronistic holdover from the time when Kentucky only permitted divorce upon a showing of "fault." A divorce from bed and board severs the marital relationship as to property and personal rights acquired after the bed and board divorce is granted but prohibits either party from marrying during the life of the other. Unlike an absolute divorce, though, both spouses in a divorce from bed and board retain their inheritance rights in the estate of the other.<sup>486</sup>

If the spouses do obtain a judgment of divorce from bed and board, they can incorporate a property agreement settling their inheritance rights in each other's estates into the judgment. In *Cecil v. Farmer's National Bank*<sup>487</sup> the wife accepted two thousand dollars in full settlement of her distributive share in her husband's estate. The property settlement was incorporated into the judgment of divorce from bed and board. The parties later reconciled and resumed living together as spouses for the six years preceding the husband's death. The wife claimed a right to take her statutory dower share in her husband's estate as his surviving spouse. The court determined that the reconciliation of the parties and the resumption of marital relations did not set aside the judgment of divorce from bed and board that contained the property settlement of the wife's inheritance rights.<sup>488</sup>

In order to annul a decree of divorce from bed and board, the parties must follow a statutorily prescribed procedure.<sup>489</sup> In *Cecil* the parties did not follow that procedure. However, their failure to comply with the statutory procedure for setting aside the divorce decree did not preclude the rescission of the property settlement by the mutual agreement of the parties. If the wife's

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<sup>483</sup> *Meyers' Adm'r v. Meyers*, 50 S.W.2d 81, 82-83 (Ky. 1932).

<sup>484</sup> *Hawkins v. Ragsdale*, 80 Ky. Op. 353, 354 (1882).

<sup>485</sup> KY. REV. STAT. ANN. § 403.050 (Michie/Bobbs-Merrill 1984).

<sup>486</sup> *Id.*; see *Coleman v. Coleman*, 269 S.W.2d 730, 738 (Ky. 1954); *Stevens v. Stevens*, 231 S.W.2d 49, 51 (Ky. 1950); *Lively v. Lively*, 7 Ky. L. Rep. 838 (1886); *Rich v. Rich*, 70 Ky. Op. 53 (1870).

<sup>487</sup> 245 S.W.2d 430 (Ky. 1952).

<sup>488</sup> *Id.* at 433.

<sup>489</sup> *Id.* at 432; see KY. REV. STAT. ANN. § 403.050 (Michie/Bobbs-Merrill 1984).

agreement to accept a lump sum payment in full settlement of her distributive share of her husband's estate were mutually rescinded, the wife would not be barred from claiming her statutory dower share in her husband's estate. The *Cecil* court remanded the case for a determination of whether there had been a mutual rescission.<sup>490</sup>

Regardless of whether the surviving spouse in the *Cecil* case could prove on remand that there had been a mutual rescission of the property settlement, she was entitled to be appointed and to continue as the decedent's personal representative. KRS section 395.040 establishes a preference in appointing a personal representative for the decedent in favor of those first entitled to distribution from the decedent's estate. A surviving spouse is preferred and then such others as are next entitled to distribution.<sup>491</sup> If after the appointment it develops that the personal representative has no distributive share in the estate of the decedent, that alone is not cause for removal of the appointee.<sup>492</sup>

### E. Suicide

At the common law, the land of a convicted or outlawed felon was forfeited to the crown for a year and a day followed by the escheat of the land to the overlord.<sup>493</sup> Personalty of the felon was forfeited absolutely to the crown.<sup>494</sup> As suicide was a felony, it resulted in such forfeitures and escheat.

Section 21 of the Kentucky Constitution expressly eliminates the common law consequences of suicide.<sup>495</sup> Section 21 provides that "[t]he estate of such persons as shall destroy their own lives shall descend or vest as in the cases of natural death."<sup>496</sup> Thus, the suicide of the decedent does not disrupt the normal course of succession.

## V. TRANSACTIONS AFFECTING INHERITANCE

### A. Advancements

An advancement is an inter vivos gift by a parent to a child that is intended by the donor as an anticipation of the donee's intestate share of

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<sup>490</sup> *Cecil*, 245 S.W.2d at 433.

<sup>491</sup> KY. REV. STAT. ANN. § 395.040 (Michie/Bobbs-Merrill 1984).

<sup>492</sup> *Cecil*, 245 S.W.2d at 433.

<sup>493</sup> W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 55.1, at 301 (1962).

<sup>494</sup> *Id.*

<sup>495</sup> KY. CONST. § 21.

<sup>496</sup> *Id.*

the donor's estate.<sup>497</sup> The Kentucky statute differs from the typical statute since it applies not only to gifts from parents to children, but also to gifts from a grandparent.<sup>498</sup>

### *B. Releases and Assignments*

Although Kentucky's case law does not clearly articulate the distinction between a release and an assignment of an expectant interest in the estate of a living person, there is a definitional distinction. If an expectancy is relinquished to the source of the inheritance before the death of the source, it is a release.<sup>499</sup> An assignment occurs when, prior to the death of the source of the inheritance, the expectancy is transferred to a third person who is not the source.<sup>500</sup> Contrary to the majority rule,<sup>501</sup> a contract of assignment and any deed or other conveyance made pursuant to such an agreement is void in Kentucky.<sup>502</sup> Contracts of release are also prohibited,<sup>503</sup> with the exception of antenuptial agreements providing for the release of inheritance rights in the estate of the other spouse. Absent fraud or undue influence, if an antenuptial agreement establishing the inheritance rights of the parties is supported by valuable consideration, the agreement is valid in Kentucky.<sup>504</sup>

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<sup>497</sup> 1 BOWE & PARKER, *supra* note 493, § 12.3, at 575.

<sup>498</sup> *E.g.*, Sandidge v. Kentucky Trust Co., 402 S.W.2d 105, 107 (Ky. 1966). For a complete exposition of Kentucky's law on advancements, see Carolyn S. Bratt, *Kentucky's Doctrine of Advancements: A Time for Reform*, 75 KY. L.J. 341 (1986).

<sup>499</sup> ATKINSON, *supra* note 3, at 725-28.

<sup>500</sup> *Id.* at 729-30.

<sup>501</sup> *E.g.*, Bednar v. Bednar, 485 N.E.2d 834, 836 (Ohio Ct. App. 1984); Barrett v. Geisinger, 93 N.E. 576, 577-78 (Ill. 1899).

<sup>502</sup> *E.g.*, Prater v. Hicks, 220 S.W.2d 1011, 1012 (Ky. 1949) (daughter to stranger); Engle v. Walters, 140 S.W.2d 402, 403 (Ky. 1940) (grandson to aunt); Riggsby v. Montgomery, 271 S.W. 564, 565 (Ky. 1925) (children to stepfather); Hunt v. Smith, 230 S.W. 936, 938-40 (Ky. 1921) (children to stranger); Flatt v. Flatt, 225 S.W. 1067, 1068 (Ky. 1920) (child to grandchild); Burton v. Campbell, 195 S.W. 1091, 1092-93 (Ky. 1917) (son to other intestate takers); Hall v. Hall, 155 S.W. 755, 756-57 (Ky. 1913) (children to other children); Spears v. Spaw, 118 S.W. 275, 276 (Ky. 1909) (children to another child); Furnish's Adm'r v. Lilly, 84 S.W. 734, 735 (Ky. 1905) (children to another child); McCall's Adm'r v. Hampton, 32 S.W. 406, 408 (Ky. 1895) (son to another child); Alves v. Schlesinger, 81 Ky. Op. 290, 293 (1883) (son to another child); Wheeler's Ex'r v. Wheeler, 59 Ky. (2 Met.) 474, 477 (1859) (son to another child).

<sup>503</sup> Weddington v. Adkins, 54 S.W.2d 331, 332 (Ky. 1932) (child to parent); Elliot v. Leslie, 99 S.W. 619, 620-21 (Ky. 1907) (child to parent); Daniel v. Lewis, 13 Ky. L. Rep. 827, 828 (1892) (grandchild to grandfather).

<sup>504</sup> Hardesty v. Hardesty's Ex'r, 34 S.W.2d 442, 443 (Ky. 1930); Herren v. Cochran, 697 S.W.2d 149, 150-51 (Ky. Ct. App. 1985).

Various rationales have been offered in support of Kentucky's general prohibition of antemortem contracts of release or assignment. The decisions regularly assert that the contracts are unenforceable because they lack a subject matter.<sup>505</sup> According to the court, every contract of sale must have a seller, a purchaser and a thing to be sold.<sup>506</sup> At the time that a contract of assignment or release is entered into, the seller has only a hope, not a certainty, of sharing in the estate of a then-living ancestor or testator.<sup>507</sup> As this naked possibility of inheritance means that the seller has no present right, vested or contingent, a contract of release or assignment lacks one of the fundamental elements of a contract—an object of the sale.<sup>508</sup>

Various policy grounds have also been asserted to justify the prohibition against all contracts of release and assignment. The courts paternalistically assume that those who anticipate sharing in the estate of a living person are peculiarly in need of protection from their own improvidence.<sup>509</sup> Also, this temptation to reduce their potential future inheritance to a presently enjoyable interest through a sale supposedly makes beneficiary expectants especially susceptible to the fraud and deceit of unscrupulous purchasers.<sup>510</sup> If the courts are correct in this evaluation, a rule of strict scrutiny of contracts of release and assignment is justifiable, but not a blanket prohibition against all contracts of release and assignment.

Kentucky's rule prohibiting the antemortem release or assignment of an expectancy is also justified as a means of preventing an expectant taker from working a fraud on the present owner of the property.<sup>511</sup> Since the expectant takers cannot anticipate their ownership of the property of an ancestor or testator, the property owner is supposedly assured that property is inherited and enjoyed by the intended recipients.<sup>512</sup> This argument has its roots in the idea that one facet of property ownership is the right to direct its devolution at death. However, the rule against contracts of release and assignment does not necessarily assure

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<sup>505</sup> *E.g.*, *Elliott*, 99 S.W. at 621-22; *McCall's Adm'r*, 32 S.W. at 407-08; *Alves*, 81 Ky. Op. at 292; *Wheeler's Ex'r*, 59 Ky. (2 Met.) at 477.

<sup>506</sup> *Elliott*, 99 S.W. at 622.

<sup>507</sup> *McCall's Adm'r*, 32 S.W. at 407.

<sup>508</sup> *Cushing v. Cushing*, 70 Ky. (7 Bush) 259, 262 (1870).

<sup>509</sup> *Burton v. Campbell*, 195 S.W. 1091, 1093 (Ky. 1917); *McCall's Adm'r*, 32 S.W. at 408.

<sup>510</sup> *Burton*, 195 S.W. at 1093; *Elliott*, 99 S.W. at 621; *McCall's Adm'r*, 32 S.W. at 408.

<sup>511</sup> *Elliott*, 99 S.W. at 621.

<sup>512</sup> *McCall's Adm'r*, 32 S.W. at 408.



that the intended object of the decedent's bounty will enjoy the property. At the moment of the ancestor's death, an intestate taker becomes the owner of the property with the power to alienate her or his interest in it.<sup>513</sup> Thus, the rule that forbids only antemortem, but not postmortem, assignments does not guarantee that the intended beneficiary will enjoy the property.

The Kentucky courts have voiced the concern that if expectant inheritance rights are assigned to a stranger-to-the-source of the inheritance rights, a danger arises because the stranger has acquired an economic interest in the life of the source. The economic interest may provide an incentive to the stranger to hasten the source's death.<sup>514</sup> This argument is particularly weak. A majority of American jurisdictions permit antemortem assignments of prospective inheritance rights<sup>515</sup> without any reported increase in the number of untimely deaths of the property owners. Furthermore, such a rationale only supports the prohibition of contracts of assignment entered into with strangers to the source. It does not support such a prohibition if the purchaser under the assignment is another natural object of the property owner's bounty, nor does it support a prohibition of contracts of release. The release of an inheritance right to the source of the inheritance creates no incentive, economic or otherwise, in favor of the early death of the source.

When the parties purport to enter into contracts of release or assignment, the expectant intestate taker or will beneficiary receives consideration from the purchase. Because the release or assignment is invalid, a question arises as to the proper disposition of the consideration

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<sup>513</sup> *E.g.*, *Robertson v. Hines*, 157 S.W. 704, 704 (Ky. 1913) (noting that Ky. St. § 2087 (now KRS § 396.110) provides that one who purchases an intestate taker's share within six months of the decedent's death takes it subject to payment of the decedent's debts and costs of administration); *Furnish's Adm'r v. Lilly*, 84 S.W. 734, 735 (Ky. 1905) (holding that children can convey to a sibling their interest in their deceased father's estate, but not their expectancy in the estate of their living mother); *Kern v. Raunser*, 50 S.W. 838, 840 (Ky. 1899) (allowing will beneficiaries to make a postmortem assignment of their interest in the testator's estate to the surviving spouse); *Peak v. Wigginton*, 11 S.W. 89, 91 (Ky. 1889) (allowing the decedent's grandchildren to validly relinquish any claim in their deceased grandfather's estate as part of compromise in a dispute between the grandchildren and the daughter of the decedent); *Evans v. Robinson*, 44 Ky. (5 B. Mon.) 589, 589 (1845) (holding that an assignee in a postmortem assignment of the distributee's share of the decedent's estate received nothing from the estate because the administrator had fully paid the distributee); *Haden v. Haden's Heirs*, 30 Ky. (7 J.J. Marsh.) 168, 169 (1832) (holding that a postmortem waiver of inheritance rights in the testator's estate was binding on those claiming through the waiving party).

<sup>514</sup> *Burton*, 195 S.W. at 1093.

<sup>515</sup> *ATKINSON*, *supra* note 3, at 726, 729.

received by the expectant beneficiary. An intestate taker is not barred by her or his contract of release with the source from sharing in the intestate estate of the source. An intestate taker is also not required to return the consideration received to the estate of the source. Instead, the consideration is treated as an advancement chargeable to the intestate taker, who cannot share further in the decedent's estate until the other intestate takers are made equal.<sup>516</sup>

When the void contract is an attempted assignment of an expectancy, recovery of the consideration paid is problematic. If the seller of an expectancy attempts to avoid her or his agreement by setting aside the deed and recovering the property from the purchaser, the seller's title to the property will be confirmed and the purchaser is entitled to the return of the consideration paid. In *Flatt v. Flatt*<sup>517</sup> a child of the property owner entered into a contract with another person to sell the child's one-sixth expectant interest in her living parent's real estate. When the parent died, the land passed under the testator's will to his surviving spouse for life with a remainder in his six issue. The purchaser of the one-sixth remainder interest died before the life tenant, and the purchaser's estate sold the purchaser's purported interest in the remainder to a stranger. The stranger took possession of the land and made improvements on it.<sup>518</sup> Five years later, after the death of the life tenant, the child brought suit against the stranger to avoid the deed and recover the land as well as its fair rental value. The court held that the child had title to a one-sixth interest in the land because the attempted sale of the expectancy was against public policy and because the deed made pursuant to the void contract was also void.<sup>519</sup> However, the stranger was permitted to subrogate to the rights of the original purchaser and recover the purchase price plus interest from the date of the void conveyance to the setting aside of the deed. The stranger was also entitled to a monetary recovery against the child for improvements that the stranger had placed on the land to the extent that the improvements had increased the vendible value of the land. The child was permitted to offset against these amounts the yearly rental value of the land for the years for which the child sued.<sup>520</sup>

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<sup>516</sup> *Weddington v. Adkins*, 54 S.W.2d 331, 332 (Ky. 1932) (charging child with an advancement equal to the value of the land conveyed by parent minus the amount of the lien); *Elliott v. Leslie*, 99 S.W. 619, 622 (Ky. 1907) (charging son with a \$1000 advancement); *Daniel v. Lewis*, 13 Ky. L. Rep. 827, 827 (1892) (charging grandchild with a \$500 advancement); *Cushing v. Cushing*, 70 Ky. (7 Bush) 259, 262 (1870) (charging son with a \$2000 advancement).

<sup>517</sup> 225 S.W. 1067 (Ky. 1920).

<sup>518</sup> *Id.* at 1068.

<sup>519</sup> *Id.*

<sup>520</sup> *Id.* at 1069.

If the purchaser under a warranty deed from a seller who had only an expectancy is ousted by someone other than either the seller of the expectancy or someone claiming through the seller, the purchaser cannot recover the consideration paid for the void contract. In *Hunt v. Smith*<sup>521</sup> the purchasers were ousted from the land by the source of the seller's expectancy, not by the seller. In their futile attempt to defend against the source's lawsuit to oust them, the purchasers also incurred legal fees. The court applied the harsh doctrine of caveat emptor and denied recovery of both the consideration paid and the legal costs incurred. The court reasoned that a purchaser is presumed to know that a contract of assignment of an expectancy is no more than a contract of chance, against public policy and unenforceable for any purpose.<sup>522</sup> When, as in the *Flatt* case, the seller under a void contract of assignment seeks equity (rescission of the deed), then the seller must do equity (restitution of the consideration).<sup>523</sup> Otherwise, there is no relief for a purchaser who enters into a void contract of assignment.

If the seller subsequently inherits the property anticipated in the contract of assignment, the purchaser is not entitled to specific performance of the contract.<sup>524</sup> Even if the seller executed a deed containing a warranty of title in order to complete the contract of assignment, the purchaser is not permitted to invoke equitable principles to estop the seller, after the seller acquires title, from either asserting title to the property or from denying the title of the purchaser.<sup>525</sup> Typically, a seller who warrants title to land when the seller does not have title is estopped from asserting title to the property and from denying the title of the purchaser if the seller later acquires the title. The seller's after-acquired title is usually found to inure to the benefit of the purchaser.<sup>526</sup> However, this equitable principle has no application when the subject matter sought to be conveyed is a mere expectancy of inheritance because of the very strong public policy of the state against such contracts.<sup>527</sup> Such a contract and any deed made pursuant to such a contract, even a deed containing warranties of title, are void in equity<sup>528</sup> and

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<sup>521</sup> 230 S.W. 936 (Ky. 1921).

<sup>522</sup> *Id.* at 941.

<sup>523</sup> *Flatt*, 225 S.W. at 1069.

<sup>524</sup> *Lowry v. Spear*, 70 Ky. (7 Bush) 451, 454 (1870).

<sup>525</sup> See *Harkins v. Hatfield*, 297 S.W. 1109, 1111 (Ky. 1927); *Riggsby v. Montgomery*, 271 S.W. 564, 565 (Ky. 1925); *Spacey v. Close*, 212 S.W. 127, 129 (Ky. 1919); *McCall's Adm'r v. Hampton*, 32 S.W. 406, 408 (Ky. 1895).

<sup>526</sup> See *Spacey*, 212 S.W. at 129.

<sup>527</sup> *Id.*

<sup>528</sup> *Riggsby*, 271 S.W. at 565; *Hunt v. Smith*, 230 S.W. 936, 940 (Ky. 1921); *Flatt v.*

at law.<sup>529</sup> Thus, the purchaser can neither invoke the equitable principle of estoppel nor recover damages for breach of warranty at law.<sup>530</sup>

Although the decisions emphatically assert that contracts of release or assignment are void, there are a handful of cases where the void contract had some limited effect. In *Lowry v. Spear*<sup>531</sup> a woman and her husband contracted with another to sell her expectancy under her living father's will. The woman and her husband agreed to pay liquidated damages if they failed to secure good title to the purchaser within a year of the father's death. After the father's death, the purchaser possessed the land with the acquiescence of the sellers, but the sellers did not convey title to the purchaser.<sup>532</sup> After the husband died, the purchaser sued for specific performance of the contract. Since the contract was void as an attempt to sell an expectancy, it was unenforceable against the woman. The liquidated damages clause, like a warranty of title in a void deed of an expectancy, was unenforceable because it was embodied in the void contract of assignment.<sup>533</sup> However, the husband's participation in the transaction created a covenant for indemnity with the purchaser that entitled the purchaser to recover from the husband's estate the money actually paid as consideration. The court did not permit an award of interest on the consideration or a deduction from the consideration of the fair rental value of the land.<sup>534</sup>

*Snyder v. Snyder*<sup>535</sup> is a similar case. In *Snyder*, a mother joined with her child in a deed purporting to convey the child's one-sixth expectant share of the mother's property to the purchaser. The deed stated that the mother was participating in the deed in order to secure the interest to the purchaser.<sup>536</sup> Although the deed was without any effect against the child because it was an invalid attempt to assign an expectancy, the deed was a valid conveyance by the mother to the purchaser of a one-sixth remainder interest in her land. When the mother died, the purchaser's remainder interest in one-sixth of the land became a present interest in one-sixth of the land.<sup>537</sup> Five-sixths of the land remained to

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Flatt, 225 S.W. 1067, 1069 (Ky. 1920); *Spacey*, 212 S.W. at 129; *Burton v. Campbell*, 195 S.W. 1091, 1093 (Ky. 1917).

<sup>529</sup> *Hunt*, 230 S.W. at 940.

<sup>530</sup> *Id.*

<sup>531</sup> 70 Ky. (7 Bush) 451 (1870).

<sup>532</sup> *Id.* at 452.

<sup>533</sup> *Id.* at 454.

<sup>534</sup> *Id.*

<sup>535</sup> 235 S.W. 743 (Ky. 1921).

<sup>536</sup> *Id.* at 744.

<sup>537</sup> *Id.* at 746.

be divided among the mother's six issue. Thus, the child who had purported to sell his own expectancy took a one-sixth interest in only five-sixths of the property.<sup>538</sup>

While the courts have given effect to contracts to sell an expectancy when the source of the inheritance consented in writing to the sale, in each such case the writing signed by the source actually went well beyond a consent to the transaction. For example, in *Lee's Executor v. Lee*<sup>539</sup> a son purported to sell to his brother his share under the will of their living father. The father executed a writing in which he requested that the brother pay a sum of money to the son and promised to make a codicil to his will giving the son's share to the brother.<sup>540</sup> Similarly, in *McBee v. Myers*<sup>541</sup> the father consented to the sale of his daughter's expectancy in his property. He stated in writing that he would give as much land to the purchaser from his daughter as he would give to any of his children. In both *Lee's Executor* and *McBee*, the parent failed to make the promised devise. Although the contract between the expectant beneficiary and the purchaser was unenforceable, in both cases the purchaser was permitted to recover the property against the father's estate, the source of the expectancy.<sup>542</sup> The court in *McBee* reasoned that the father, by virtue of his promise to secure the property in question to the purchaser in exchange for the consideration paid to the expectant beneficiary, was divested of the right to dispose otherwise of that portion of his estate designated in the writing.<sup>543</sup>

These two cases have been criticized as resting on merely the technical distinction, without a sound difference, between a sale of an expectancy without the written consent of the source and a sale with the written consent of the source. The critics claim that in either case the expectant beneficiary had no interest or estate in the property to sell.<sup>544</sup> These cases are better understood, however, as will contract cases. The writing evidenced a promise from the source to the purchaser to make a particular will. Such a promise was absent in the cases wherein the source merely assented verbally to the purported assignment.<sup>545</sup> The courts in *Lee* and *McBee* merely enforced the parent's contractual obligation to the purchaser to make the promised will gift.

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<sup>538</sup> *Id.*

<sup>539</sup> 63 Ky. (2 Duv.) 134 (1865).

<sup>540</sup> *Id.* at 134-35.

<sup>541</sup> 67 Ky. (4 Bush) 356 (1868).

<sup>542</sup> *Id.* at 359; *Lee's Ex'r*, 63 Ky. (2 Duv.) at 136.

<sup>543</sup> *McBee*, 67 Ky. (4 Bush) at 359.

<sup>544</sup> *Elliott v. Leslie*, 99 S.W. 619, 621 (Ky. 1907).

<sup>545</sup> *E.g.*, *Spears v. Spaw*, 118 S.W. 275 (Ky. 1909); *Alves v. Schlesinger*, 81 Ky. 290 (1883).

In a more recent case, *Roberts v. Conley*,<sup>546</sup> the court expressly used the will contract theory to sustain its decision.<sup>547</sup> A daughter purported to convey to other issue of her mother any interest that the daughter might receive under her mother's will. In the same instrument the mother promised the other issue that she would make a will excluding the daughter from any share in the mother's estate.<sup>548</sup> Nonetheless, the mother's final will included the daughter as a beneficiary. The court excluded the daughter pursuant to the mother's agreement with the other heirs, which the court characterized as a will contract.<sup>549</sup> The court held that a written contract *not* to leave property by will to a particular person is valid because a written contract to leave property by will to a particular person is valid and enforceable.<sup>550</sup>

It is unfortunate that the Kentucky Supreme Court used the *Roberts* case to articulate the will contract rationale for giving effect to these otherwise void contracts of assignment. A valid will contract requires consideration<sup>551</sup> for the promise to leave a particular will. *Roberts* is the weakest of the three cases because, despite the mother's written promise to make a will excluding the daughter, there is no consideration to support it. In the *Lee's Executor* and *McBee* cases, the child who wanted to sell his expectancy received a monetary payment from the would-be purchaser.<sup>552</sup> The purchaser's payment to the child was made at the direction of the parent and served as the consideration to support the parent's promise to the purchaser to make the particular will. In *Roberts*, however, the parent paid the money to her daughter and then promised her other children that she would not leave any property to that daughter.<sup>553</sup> There was no consideration for the mother's promise either by way of a payment to the daughter or by the return of a promise of value to the mother.

### C. Marriage Contracts

There are four basic types of marriage contracts: premarital (antenuptial), marital (postnuptial), separation, and reconciliation contracts. The difference between an antenuptial and a marital contract is one of timing. An antenuptial

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<sup>546</sup> 626 S.W.2d 634 (Ky. 1981).

<sup>547</sup> *Id.* at 638-39.

<sup>548</sup> *Id.* at 635.

<sup>549</sup> *Id.* at 638-39.

<sup>550</sup> *Id.*

<sup>551</sup> *First Sec. Nat'l Bank & Trust Co. of Lexington v. Merriman*, 440 S.W.2d 256, 259 (Ky. 1969).

<sup>552</sup> *McBee v. Meyers*, 67 Ky. (4 Bush) 356, 357 (1868); *Lee's Ex'r v. Lee*, 63 Ky. (2 Duv.) 134, 135 (1865).

<sup>553</sup> *Roberts*, 626 S.W.2d at 635.

contract is executed by a couple contemplating marriage,<sup>554</sup> whereas a marital contract is executed by a couple who is already married.<sup>555</sup> The marital contract differs from a separation agreement in that the separation agreement is made in contemplation of divorce or separation, whereas the marital contract is not.<sup>556</sup> As the name implies, a reconciliation contract is entered into by a married couple who have separated but are contemplating a resumption of their marital relationship.<sup>557</sup>

The permissibility of these various types of marriage contracts formerly depended upon the type of provisions contained therein. For example, provisions for the allocation of spousal property rights at death and individual spousal control of separate spousal property during marriage have always been a permissible subject matter for any of the four types of marriage contracts. Provisions allocating spousal property or support rights at divorce were permissible if the contract was one of separation or reconciliation.<sup>558</sup> In 1990, the Kentucky Supreme Court upheld the validity of antenuptial agreements that allocated the parties' property and support rights at divorce.<sup>559</sup> For purposes of this Article, the discussion of marriage contracts is limited to contracts, typically premarital and marital contracts, relinquishing or limiting spousal inheritance rights at death.

At the early common law, premarital and marital contracts were ineffectual. As a married woman lacked the capacity to contract, a wife could not enter into a valid contract with her husband during marriage. If the couple contracted with each other prior to marriage, upon marriage the wife's legal identity merged into her husband. This civil death of a

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<sup>554</sup> LOUISE E. GRAHAM & JAMES G. KELLER, KENTUCKY DOMESTIC RELATIONS LAW § 13.02(A) (1988).

<sup>555</sup> *Id.* § 13.02(B).

<sup>556</sup> *See id.* § 7.03.

<sup>557</sup> *Id.* § 7.05(D).

<sup>558</sup> *Whalen v. Whalen*, 581 S.W.2d 578, 579-80 (Ky. Ct. App. 1979) (enforcing a reconciliation agreement because it contemplated a resumption of the marital relationship and provided for a property distribution in the event that the reconciliation failed). *But cf.* *Clark v. Clark*, 425 S.W.2d 745, 747 (Ky. 1968) (holding a reconciliation agreement unenforceable because it only contained provisions that became operative at divorce).

<sup>559</sup> *See Gentry v. Gentry*, 798 S.W.2d 928, 936-37 (Ky. 1990); *Edwardson v. Edwardson*, 798 S.W.2d 941, 945-46 (Ky. 1990). For a discussion of antenuptial and postnuptial agreements, see GRAHAM & KELLER, *supra* note 554, § 13.04.

woman upon marriage extinguished any antenuptial agreement between the spouses.<sup>560</sup> The common law bar to both antenuptial and postnuptial marriage contracts has been eliminated by case law<sup>561</sup> and by statute.<sup>562</sup> Today, married women retain their separate legal identity after marriage<sup>563</sup> as well as their premarital capacity to contract.<sup>564</sup>

Because a premarital contract to relinquish or limit spousal inheritance rights is in consideration of marriage, it is an agreement which falls within Kentucky's Statute of Frauds.<sup>565</sup> As a result, the agreement must be written and signed by the party to be charged.<sup>566</sup> Kentucky does not follow the rule that part performance of an unenforceable oral contract is sufficient to take the contract out of the Statute of Fraud's writing requirement.<sup>567</sup> Thus, even if a marriage subsequent to an oral premarital contract is construed as part performance of the contract, the oral agreement is nonetheless unenforceable.<sup>568</sup>

If a party to an oral antenuptial agreement has received part of the consideration from the other party and then invokes the Statute of Frauds defense to avoid complying with the remaining terms of the agreement, the consideration already received must be returned.<sup>569</sup> In one case,<sup>570</sup> the oral premarital contract provided that each party renounced her or his interest in the estate of the other and that each would make the other the beneficiary of a life insurance policy on the promisor's life. When the wife died, her husband claimed the proceeds of the life insurance policy on her life as the policy's beneficiary, but he also claimed his spousal share of her estate. He alleged that their oral antenuptial contract was unenforceable. The court readily sustained the unenforceability of the

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<sup>560</sup> 2 ALEXANDER LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90, at 90-26 to 90-27 (1985).

<sup>561</sup> See *Maze's Ex'rs v. Maze*, 99 S.W. 336, 337 (Ky. 1907) (refusing to rely on trial court's rationale that a married woman could not contract with her husband because she was *femme couverte*).

<sup>562</sup> KY. REV. STAT. ANN. §§ 404.010-.060 (Michie/Bobbs-Merrill 1984).

<sup>563</sup> *Id.* § 404.010.

<sup>564</sup> *Id.* § 404.020.

<sup>565</sup> *Id.* § 371.010(5).

<sup>566</sup> *Id.* § 371.010.

<sup>567</sup> See *Terry v. Terry*, 95 S.W.2d 282, 283-84 (Ky. 1936).

<sup>568</sup> See *Wesley v. Wesley*, 204 S.W. 165, 170 (Ky. 1918) (holding that an oral antenuptial agreement to give the wife a specific sum of money in consideration of the marriage was unenforceable).

<sup>569</sup> See, e.g., *Newby v. Wilson*, 307 S.W.2d 927, 928 (Ky. 1957).

<sup>570</sup> *Glazebrook v. Glazebrook's Ex'r*, 13 S.W.2d 776 (Ky. 1929).



contract because it was not in writing. However, the court held that the husband was the beneficiary on the insurance policy only as consideration for the oral agreement.<sup>571</sup> Therefore, he was not permitted to keep the consideration and rely on the Statute of Frauds to avoid his contract promise renouncing any interest in his wife's property. The court permitted him to elect to take his renounced share against the will of his wife, but he had to return the insurance proceeds to his wife's estate.<sup>572</sup>

Although oral premarital and marital contracts are unenforceable, testimony concerning such oral agreements is admissible for some purposes. If there was fraud or mistake in the procurement of a written contract, the fraud or mistake may be proven by parol evidence of a previous or contemporaneous oral agreement between the parties that varies or contradicts the terms and conditions of the written agreement.<sup>573</sup>

The terms of a premarital and marital agreement not only must be in writing, but the terms must also be unambiguous.<sup>574</sup> Any ambiguity in the meaning of the contract is construed against the person relying on the contract.<sup>575</sup> In *Hardesty v. Hardesty's Executor*<sup>576</sup> the antenuptial agreement expressly provided that the wife would receive a certain denomination savings bond if she survived her husband. Although the contract did not contain any express waiver of dower and other marital rights by the wife, such a waiver can be implied when the antenuptial contract makes such substantial provisions for the spouse as to indicate that it was intended to be in lieu of dower and other inheritance rights.<sup>577</sup> However, this contract provision of \$500 for the wife was not a substantial sum. Thus, no implied waiver was found. Instead, the court construed the agreement against the husband's estate. The court treated the husband's promise as merely an inducement to marry and not as a

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<sup>571</sup> *Id.* at 777-78.

<sup>572</sup> *Id.*

<sup>573</sup> *Games v. Games' Adm'r*, 173 S.W. 774, 776 (Ky. 1915) (using parole evidence to explain and interpret circumstances surrounding a written antenuptial agreement).

<sup>574</sup> See *Pyeatte v. Pyeatte*, 661 P.2d 196, 200 (Ariz. Ct. App. 1982) (holding that a husband's antenuptial agreement to support his wife through her master's degree program was unenforceable because it did not clearly set forth all the material terms). But see *Jackson v. Jackson*, 626 S.W.2d 630, 632 (Ky. 1982) (holding that a husband's antenuptial agreement to furnish his wife with "decent support during his natural life" was enforceable).

<sup>575</sup> *Hardesty v. Hardesty's Ex'r*, 34 S.W.2d 442, 443 (Ky. 1936).

<sup>576</sup> 34 S.W.2d 442 (Ky. 1936).

<sup>577</sup> *Id.*

complete settlement of the wife's rights.<sup>578</sup> As a result, the wife took the \$500 bond as well as her elective share in her deceased husband's estate.<sup>579</sup>

Premarital and marital contracts also require an exchange of consideration in order to be valid. In an antenuptial contract, the marriage is adequate consideration to support the contract.<sup>580</sup> In a postnuptial contract, the consideration requirement is satisfied if both parties either waive existing rights or take on new obligations.<sup>581</sup> For postnuptial contracts that do not contain reciprocal promises, the consideration might be found in the continuation of the marriage.

There are only two Kentucky cases involving a postnuptial marriage contract. In the most recent case, *Herren v. Cochran*,<sup>582</sup> the parties to a valid premarital contract executed an addendum to it after their marriage. The addendum made certain provisions more generous for the wife if the husband were to die during the first five years of the marriage, but did not contain any consideration for these changes. The court did not address the validity of the addendum because the husband did not die until seven years after the marriage. However, it is interesting to note that the court in discussing the addendum referred to it "as moot," not as invalid.<sup>583</sup> In *Maze's Executors v. Maze*,<sup>584</sup> the earlier Kentucky case, the court invalidated a postnuptial agreement by which a husband and wife waived all of their inheritance rights. The court invalidated the agreement not because it was a postnuptial agreement, but because it was inequitable and fraudulently obtained by the husband.<sup>585</sup>

Although premarital and marital contracts must be supported by consideration, the consideration need not be expressed in the writing embodying the terms of the agreement.<sup>586</sup> When necessary, the consideration may be proved by parol or other evidence. Similarly, even if adequate consideration to support the contract is recited in the writing

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<sup>578</sup> *Id.*

<sup>579</sup> *Id.* at 443.

<sup>580</sup> *Id.*

<sup>581</sup> *Cf.* *Scott v. Scott*, 529 S.W.2d 656, 657 (Ky. 1975) (holding that mutual waivers and promises are adequate consideration).

<sup>582</sup> 697 S.W.2d 149 (Ky. 1985).

<sup>583</sup> *Id.* at 150.

<sup>584</sup> 99 S.W. 336 (Ky. 1907).

<sup>585</sup> *Id.* at 336-37.

<sup>586</sup> *Cf.* *Glazebrook v. Glazebrook's Ex'r*, 13 S.W.2d 776, 777 (Ky. 1929) (stating that the designation of appellant as beneficiary under a life insurance policy pursuant to an antenuptial agreement was part of the consideration for said agreement).

evidencing the contract, the truthfulness of the recital may be attacked by parol and other evidence.<sup>587</sup>

As with all contracts, premarital and marital contracts cannot be procured by fraud or undue influence. However, the party attacking the validity of such contracts is not required to produce the same volume or degree of proof of fraud or undue influence as would be necessary to set aside an ordinary contract.<sup>588</sup> The rationale behind this lower standard for establishing fraud or undue influence in the case of premarital or marital contracts is that the agreement arises out of a confidential, not a commercial, relationship.<sup>589</sup>

Fraud may take the form of a knowing misrepresentation by one of the contracting parties of her or his assets. An actionable misrepresentation must satisfy the elements of the common law tort of deceit. One party must make a knowing, material, false statement with the intent of inducing reliance by the other party, and the other party must reasonably rely upon the false statement.<sup>590</sup> In the context of premarital and marital contracts, fraud more commonly takes the form of nondisclosure or concealment;<sup>591</sup> that is, one of the parties does not fairly disclose the value of her or his property to the other party.

For a premarital or marital contract to be valid, the party who is waiving inheritance and other property rights in the other spouse's estate must be aware of the nature and the extent of the other spouse's estate and the value of the marital rights in that property which are being surrendered by the terms of the contract.<sup>592</sup> Typically, the waiving spouse acquires her or his knowledge of the nature and extent of the other spouse's estate directly from the other spouse.<sup>593</sup> However, in *Gaines v. Gaines' Administrator*,<sup>594</sup> the prospective husband's failure to disclose his assets did not invalidate the antenuptial contract because the prospective wife had personal knowledge, acquired from her years in the community, that her husband-to-be was the "wealthiest man in Boone

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<sup>587</sup> Cf. *Apple v. McCullough*, 38 S.W.2d 955, 956-57 (Ky. 1931) (holding that consideration recited in a written contract may be contradicted by parol evidence).

<sup>588</sup> *Maze's Ex'rs*, 99 S.W. at 337.

<sup>589</sup> *Potter's Ex'r v. Potter*, 29 S.W.2d 15, 16 (Ky. 1930) (invalidating an antenuptial agreement for nondisclosure).

<sup>590</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105, at 728 (5th ed. 1984).

<sup>591</sup> E.g., *Potter's Ex'r*, 29 S.W.2d at 16.

<sup>592</sup> *Id.*

<sup>593</sup> E.g., *Harlin v. Harlin*, 87 S.W.2d 937, 939 (Ky. 1935).

<sup>594</sup> 173 S.W. 774 (Ky. 1915).

County.”<sup>595</sup> Thus, either actual disclosure by the contracting party or notice from other sources of the nature and size of the prospective spouse’s estate will defeat a claim that the contract was obtained fraudulently through nondisclosure or concealment.

An antenuptial contract signed before the waiving party is fully apprised of the nature and extent of the other party’s estate and the value of the marital rights being surrendered is valid if there is full disclosure prior to the marriage.<sup>596</sup> In *Stratton v. Wilson*<sup>597</sup> the court sustained such a contract. Even though the waiving party had signed the contract before full disclosure was made, the court treated the marriage of the parties subsequent to the signing of the contract and the disclosure of assets as a manifestation of the waiving party’s willingness to accept the provisions of the contract.<sup>598</sup>

A gross disproportion between the amount the waiving party is to receive under the contract and what that party would have received under the statutes controlling the inheritance rights of a spouse does not in itself establish fraud in the procurement of the contract.<sup>599</sup> However, it does give rise to a rebuttable presumption that the contract was obtained by fraud, and the court will carefully scrutinize the circumstances of the execution of such agreements.<sup>600</sup> The party relying on the contract bears the burden of showing that, despite the disproportionality, the execution of the contract was fairly obtained without fraud, concealment, or deception.<sup>601</sup> For example, in *Harlin v. Harlin*<sup>602</sup> the wife was to receive only one twenty-fifth of her husband’s estate if she survived him. This amount was significantly less than what the inheritance statutes would have given her. Nonetheless, the court sustained the contract because the husband had fully disclosed the nature and extent of his estate prior to entering into the contract and because there were no other indicia of unfairness about the contract.<sup>603</sup>

There are cases from other jurisdictions requiring each spouse to have counsel in order to insure a fair contract free from fraud and undue influence.<sup>604</sup> In Kentucky, however, the absence of independent counsel, standing alone, does not raise a presumption of fraud or undue influence.<sup>605</sup>

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<sup>595</sup> *Id.* at 776.

<sup>596</sup> *Edwardson v. Edwardson*, 798 S.W.2d 941, 945 (Ky. 1990).

<sup>597</sup> 185 S.W. 522 (Ky. 1916), *overruled on different grounds by* *Gentry v. Gentry*, 798 S.W.2d 928, 934 (Ky. 1990).

<sup>598</sup> *Id.* at 525.

<sup>599</sup> *Harlin v. Harlin*, 87 S.W.2d 937, 939-40 (Ky. 1935); *Gaines*, 173 S.W. at 777.

<sup>600</sup> *Gaines*, 173 S.W. at 777.

<sup>601</sup> *Id.*

<sup>602</sup> 87 S.W.2d 937 (Ky. 1935).

<sup>603</sup> *Id.* at 939-40.

<sup>604</sup> *E.g.*, *Friedlander v. Friedlander*, 494 P.2d 208, 214 (Wash. 1972).

<sup>605</sup> *See* *Lipski v. Lipski*, 510 S.W.2d 6 (Ky. 1974) (sustaining an antenuptial

Premarital and marital contracts must be freely entered into by the parties. A showing of undue influence or duress negates the voluntariness of the transaction. Such a showing can be made in those situations where one party to the contract so dominates the other that the weaker party's volition is overcome. For example, in *Tilton v. Tilton*<sup>606</sup> the court struck an antenuptial contract between a financially well-off businessman and his poor, uneducated housekeeper because of his overwhelming dominance in the relationship.<sup>607</sup> A similar result was reached in *Potter's Executor v. Potter*,<sup>608</sup> because the husband was a person of means and the wife was financially dependent on her family, could only read and write a little, and lacked any business knowledge.<sup>609</sup> The superiority of the husband's bargaining position amounted to undue influence. However, in *Lipski v. Lipski*<sup>610</sup> the court sustained an antenuptial contract providing the wife with only \$25,000 out of a million dollar estate. The court determined that the parties were of equal bargaining power, or at least had enough power so as to protect their individual interests.<sup>611</sup> Although the husband was a prosperous businessman, the wife in this case was a woman of education whom the court characterized as possessing good judgment. The court also assumed that the wife had knowledge of a surviving spouse's legal rights because her previous marriage had ended in the death of her husband.<sup>612</sup>

If the more dominant spouse deprives the weaker spouse of an opportunity to consult with friends and family prior to signing the contract, the court may use that fact as a ground for finding that the contract was a product of undue influence.<sup>613</sup> Conversely, a lapse of time between an agreement to relinquish or modify inheritance rights and

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agreement despite only one party being represented by counsel); *Harlin*, 87 S.W.2d at 937.

<sup>606</sup> 113 S.W. 134 (Ky. 1908).

<sup>607</sup> *Id.* at 137.

<sup>608</sup> 29 S.W.2d 15 (Ky. 1930).

<sup>609</sup> *Id.* at 16.

<sup>610</sup> 510 S.W.2d 6 (Ky. 1974).

<sup>611</sup> *Id.* at 8.

<sup>612</sup> *Id.*

<sup>613</sup> *Maze's Ex'rs v. Maze*, 99 S.W. 336, 337 (Ky. 1907) (acting under the advice of his lawyer, the husband had his wife write out the marital contract, thereby avoiding the witnessing requirement and depriving the wife of an opportunity to consult with her friends or counsel); *Simpson v. Simpson's Ex'rs*, 23 S.W. 361, 362-63 (Ky. 1893) (discussing a situation where the husband had his future wife sign an antenuptial agreement drawn up two days before their scheduled marriage and deprived his wife of an opportunity to consult with her friends by insisting that the marriage take place at 5:00 a.m. the next morning).

the actual signing of the contract containing those terms refutes the allegation that the waiving party was under the dominion of the other party.<sup>614</sup> Although the cases setting aside a premarital contract for undue influence in Kentucky all involve a dominant male, shrewd in business, who marries an uneducated, submissive woman, the undue influence defense to enforcement of an antenuptial contract is not so limited. It would be equally applicable to a situation in which a younger woman takes undue advantage of an older man in order to procure a relinquishment of his inheritance rights in her estate.

Although there are cases to the contrary in other states,<sup>615</sup> a presumption of undue influence should not arise merely because one of the parties either threatens to call off the engagement or will not agree to the marriage unless certain provisions are included in an antenuptial contract. Any other rule is inconsistent with the idea behind premarital and marital contracts that spouses generally have the capacity to bargain with each other. A prospective spouse should be able to offer the terms under which she or he is willing to marry without giving rise to a charge of undue influence in the procurement of the contract.

While there is a greater potential for duress and undue influence when one prospective spouse presents an antenuptial contract to another immediately prior to the marriage ceremony, Kentucky case law has sustained the validity of an antenuptial contract signed only a half an hour before the wedding.<sup>616</sup> The parties in *Harlin v. Harlin* had generally discussed the terms of the agreement for a period of three to four months prior to the day of the signing and the wedding.<sup>617</sup> The issue in the case of a marriage contract executed on the day of, or very close to, the wedding is not just the timing, but whether the would-be spouses have previously discussed the terms. If the agreement merely reflects the results of earlier discussions, there ought not to be a finding of undue influence in the procurement of the contract.<sup>618</sup> If, however, the terms of the contract were not discussed prior to its presentment shortly before

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<sup>614</sup> See *Gaines v. Gaines*, 173 S.W. 774, 777-78 (Ky. 1915) (discussing a situation in which a second antenuptial contract was signed six months after the execution of an earlier contract containing substantially the same provisions).

<sup>615</sup> See, e.g., *Lutgert v. Lutgert*, 338 So. 2d 1111, 1116-17 (Fla. Dist. Ct. App. 1976); *In re Marriage of Matson*, 705 P.2d 817, 820-21 (Wash. 1985).

<sup>616</sup> *Harlin v. Harlin*, 87 S.W.2d 937, 938 (Ky. 1935).

<sup>617</sup> *Id.*

<sup>618</sup> See *Osborne v. Osborne*, 428 N.E.2d 810, 817 (Mass. 1981) (upholding an antenuptial agreement that was previously discussed by the parties and presented to the intended husband on their wedding day).

the wedding, a very heavy presumption of undue influence is appropriate.<sup>619</sup>

There is also a fairness requirement for marriage contracts which must be satisfied in conjunction with, and independent of, any other allegations of fraud, duress, or undue influence. This requirement goes beyond the idea that a contract cannot be the product of fraud, duress, or undue influence. It is really an equitable idea that functions either as an independent limit on premarital and marital contracts or as supporting evidence tending to prove fraud or undue influence. The contract provisions must be reasonable and entered into in good faith by both parties.<sup>620</sup> The fairness of the contract is determined by careful scrutiny of all the circumstances surrounding its execution.<sup>621</sup> The age of the parties, their previous matrimonial experience, and the circumstances of each party,<sup>622</sup> including their business acumen,<sup>623</sup> educational levels,<sup>624</sup> relative financial situations,<sup>625</sup> whether the marriage is one of convenience,<sup>626</sup> and the haste or secretiveness of the signing<sup>627</sup> are relevant factors in determining the fairness of the contract provisions. For example, a marriage of convenience might explain the disproportionality of the provisions for one of the parties. A hasty or secretive signing of the contract might be indicative of an unfairly obtained agreement.

Premarital and marital contracts are effective to limit or bar the surviving spouse's inheritance rights as long as the contract has not been abandoned or revoked. Unilateral, inter vivos abandonment is a recognized defense to the enforcement of an antenuptial agreement.<sup>628</sup> The surviving spouse must show that the deceased spouse possessed actual or

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<sup>619</sup> See *Simpson v. Simpson's Ex'rs*, 23 S.W. 361, 362 (Ky. 1893).

<sup>620</sup> *Tilton v. Tilton*, 113 S.W. 134, 136-37 (Ky. 1908).

<sup>621</sup> See *Harlin*, 87 S.W.2d at 939-40; *Gaines v. Gaines' Adm'r*, 173 S.W. 774, 777-78 (Ky. 1915).

<sup>622</sup> *Harlin*, 87 S.W.2d at 939.

<sup>623</sup> *Maze's Ex'rs v. Maze*, 99 S.W. 336, 337 (Ky. 1907).

<sup>624</sup> *Lipski v. Lipski*, 510 S.W.2d 6, 8 (Ky. 1974); *Potter's Ex'r v. Potter*, 29 S.W.2d 15, 16 (Ky. 1930); *Tilton*, 113 S.W. at 137.

<sup>625</sup> *Potter's Ex'r*, 29 S.W.2d at 16; *Tilton*, 113 S.W. at 137; *Simpson v. Simpson's Ex'rs*, 23 S.W. 361, 362 (Ky. 1893).

<sup>626</sup> *Gaines v. Gaines' Adm'r*, 173 S.W. 774, 777 (Ky. 1915).

<sup>627</sup> *Maze's Ex'rs*, 99 S.W. at 336-37; *Simpson*, 23 S.W. at 362.

<sup>628</sup> See *Harlin v. Harlin*, 87 S.W.2d 937, 940 (Ky. 1935) (holding that a husband's failure to pay certain taxes stipulated in the antenuptial contract for the year in which he died did not constitute an abandonment of the contract); see also *Prather v. Cox*, 689 S.W.2d 623, 624 (Ky. Ct. App. 1985) (finding the evidence sufficient for reasonable minds to conclude that the husband had abandoned the antenuptial contract by controlling both spouses' property and commingling it).

constructive knowledge of the proper interpretation of the terms and voluntarily abandoned the contract by failing to carry out some of its terms.<sup>629</sup> If this is established, the contract will no longer serve as a bar to the surviving spouse's inheritance rights. As with other contracts, revocation of an antenuptial or postnuptial contract, as opposed to abandonment, cannot be accomplished unilaterally. While the issue of whether these types of contracts can be revoked orally is unresolved,<sup>630</sup> the Kentucky Court of Appeals has treated physical destruction of the antenuptial contract by one spouse in the presence of the other spouse as a valid revocation of the instrument.<sup>631</sup>

For a premarital or marital agreement to be valid against a bona fide purchaser from, or creditor of, one of the parties to the contract, the contract must be acknowledged and recorded.<sup>632</sup>

#### D. Disclaimers

Kentucky has adopted the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (the "Act").<sup>633</sup> The Act eliminated the common law rule that a testate share could be disclaimed by the intended beneficiary within a reasonable period of time after the testator's death, but that an intestate share could not be renounced by its recipient.<sup>634</sup> Under the common law rule, title to intestate property passed to the intestate taker instantly upon the death of the decedent, whereas a will gift had to be accepted by the donee before title actually devolved. While a disclaimer by a will beneficiary prevented title from passing to the intended beneficiary, a disclaimer by an intestate taker divested the intestate taker of title to the property renounced.<sup>635</sup> This conceptual distinction between disclaimers by will beneficiaries and disclaimers by intestate takers meant that the latter event was treated as a gratuitous transfer of title by the disclaimant to another. This, in turn, meant that the disclaimer had federal gift tax implications.<sup>636</sup> The Act eliminates the

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<sup>629</sup> *Harlin*, 87 S.W.2d at 940.

<sup>630</sup> *Stratton v. Wilson*, 185 S.W. 522, 524-25 (Ky. 1916), *overruled on different grounds by* *Gentry v. Gentry*, 798 S.W.2d 928, 934 (Ky. 1990).

<sup>631</sup> *Carter v. Carter*, 656 S.W.2d 257, 258 (Ky. Ct. App. 1983).

<sup>632</sup> KY. REV. STAT. ANN. § 382.080 (Michie/Bobbs-Merrill 1972).

<sup>633</sup> *Id.* §§ 394.610-.680.

<sup>634</sup> ATKINSON, *supra* note 3, at 774-76.

<sup>635</sup> *Id.* at 775-76.

<sup>636</sup> *Hardenberg v. Comm'r*, 198 F.2d 63, 66 (8th Cir.) (discussing the effect of an intestate disclaimer), *cert. denied*, 344 U.S. 836 (1952), *aff'g*, 17 T.C. 166 (1951); *Brown v. Routzahn*, 63 F.2d 914, 916-17 (6th Cir.) (discussing the effect of a testate disclaimer), *cert. denied*, 290 U.S. 641 (1933).



conceptual distinction between these two acts of renunciation by permitting disclaimers by both intestate and testate takers.<sup>637</sup> Neither type of disclaimer is now treated as a gratuitous transfer of the disclaimant's interest in the property.

By adopting the Act, the legislature has expanded the right to disclaim of many takers. Not only may both intestate and testate takers disclaim, but a will beneficiary who is given a future interest, rather than a present interest, in property of either a legal or equitable nature may also disclaim.<sup>638</sup> Will beneficiaries of interests such as a power to consume, to appoint, or to apply property for any purpose also have the right to disclaim such interests.<sup>639</sup> The Act extends the right to disclaim to representatives of incapacitated or protected persons and to appointees under a power of appointment exercised by a testamentary instrument.<sup>640</sup> Successive disclaimers are permitted because persons succeeding to a disclaimed interest also have the power to disclaim.<sup>641</sup> Since 1980, the right to disclaim survives the death of the person having the right to do so.<sup>642</sup> The right may be exercised by the personal representative of such a person within the time periods stipulated in the Act.<sup>643</sup>

A person who has the right to disclaim may disclaim in whole or in part.<sup>644</sup> At the least complicated level, a partial disclaimer permits an intestate or testate taker to disclaim some fractional portion of her or his share.<sup>645</sup> Thus, an intestate taker who is entitled to all of the decedent's estate could disclaim a third of her or his interest and retain title to a two-thirds interest in the estate. A will beneficiary who was given land and money could disclaim one gift and keep the other. Similarly, a sole intestate taker of a decedent who died owning Blackacre in fee simple should be able to disclaim her or his fee title to a physical portion of the land. For example, if Blackacre consists of ninety-nine acres, the intestate should be able to disclaim fee title to one-third of the land while retaining fee title to the remaining sixty-six acres. In addition, a will recipient of

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<sup>637</sup> KY. REV. STAT. ANN. § 394.610 (Michie/Bobbs-Merrill 1984).

<sup>638</sup> *Id.*

<sup>639</sup> UNIF. PROBATE CODE § 2-801(a) cmt., 8 U.L.A. 161 (1991).

<sup>640</sup> KY. REV. STAT. ANN. § 394.610 (Michie/Bobbs-Merrill 1984).

<sup>641</sup> *Id.*

<sup>642</sup> 1980 Ky. Acts ch. 259, § 17.

<sup>643</sup> KY. REV. STAT. ANN. § 394.610 (Michie/Bobbs-Merrill 1984).

<sup>644</sup> *Id.*

<sup>645</sup> 2 RICHARD V. WELLMAN, UNIFORM PROBATE CODE PRACTICE MANUAL 73 (2d ed. 1977).

a \$1000 monetary bequest should be able to disclaim ownership of some part of the sum of money and keep the rest.

The more difficult question is whether the Act's provision on partial disclaimers authorizes a disclaimer that has the effect of changing the nature of the disclaimant's title interest in the property. For example, suppose an intestate taker of a fee simple interest in Blackacre wants to disclaim all but a life estate interest in the land.<sup>646</sup> Under Kentucky's intestacy statutes, the sole intestate taker succeeds to the decedent's whole title in the land that the decedent died owning.<sup>647</sup> When there is more than one intestate taker, they are concurrent owners of a fractional interest in the same size estate that the decedent died owning.<sup>648</sup> If the Act authorizes the disclaimer of part of the decedent's title as well as title to a physical part of the land, the intestate taker's remaining interest in the land is one incapable of creation by operation of the state's intestacy laws. A fee simple interest in either one hundred acres of land or in ten acres of land because of a disclaimer of title to ninety acres is still the same title interest the intestacy statutes contemplate descending to an intestate taker. However, a life estate in land that the decedent owned at death in fee simple is not an interest capable of being created in an intestate taker by operation of the intestacy statutes. At least one commentator has suggested that if the disclaiming instrument, rather than the intestacy statutes or the will, determines the nature of the taker's title, the disclaimer ought not to be permitted.<sup>649</sup> Thus, under this interpretation of the Act, it would be permissible to disclaim title to a physical part of the object of the gift, but it would be impermissible to disclaim part of the title interest in the object of the gift.

A valid disclaimer must be done via a writing that declares the disclaimant's intention to disclaim, describes the property or interest disclaimed as well as the extent of the disclaimer, and is signed by the disclaimant.<sup>650</sup> To remove the uncertainties of the common law rule that a disclaimer had to be made within a reasonable period of time,<sup>651</sup> the Act fixes a definite time within which a disclaimer must be made. A disclaimer of a present interest must be made within nine months after the

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<sup>646</sup> This situation is significantly different from the disclaimer of all title to some physical portion of Blackacre. The attempted disclaimer, if permitted, actually redefines the nature of the intestate share of the disclaimant.

<sup>647</sup> KY. REV. STAT. ANN. § 391.010 (Michie/Bobbs-Merrill 1984).

<sup>648</sup> *Id.*

<sup>649</sup> WELLMAN, *supra* note 645, at 73-74.

<sup>650</sup> KY. REV. STAT. ANN. § 394.610 (Michie/Bobbs-Merrill 1984).

<sup>651</sup> ATKINSON, *supra* note 3, at 776.

death of the property owner or donee of the power.<sup>652</sup> A future interest must be disclaimed no later than nine months after the taker of the interest is definitely ascertained and the interest taken is indefeasibly vested.<sup>653</sup>

For example, if a will leaves property to "A for life, remainder to B," the life tenant's interest must be disclaimed within nine months of the testator's death because A is given a present possessory life estate in the property. Although B is given a future interest in remainder, B must also disclaim within nine months of the testator's death. The identity of the taker (B) is fixed at the moment of the testator's death. As there is no requirement that B must survive the life tenant to take the remainder, B's remainder interest is indefeasibly vested at the death of the testator. If, on the other hand, the devise were to "A for life, then if B survives A, to B," A must again disclaim within nine months of the testator's death, but B must disclaim no later than nine months after the death of A. Only when A dies survived by B does B's interest indefeasibly vest in B.

The disclaimant must file the disclaimer in the district court of the county in which proceedings have been or could be commenced, if not yet commenced, for the administration of the deceased owner's estate.<sup>654</sup> A copy of the disclaimer must also be delivered in person or mailed by registered or certified mail to the personal representative or other fiduciary of the decedent or donee of the power.<sup>655</sup> If disclaiming real property or an interest in real property, the disclaimant may record a copy of the disclaimer in the office of the county clerk of the county in which the real property is situated.<sup>656</sup>

Even if the relevant time period for disclaiming has not yet expired, the right to disclaim may be otherwise barred. Various acts of the disclaimant, inconsistent with renunciation, bar the right to renounce. Such acts include 'an assignment, conveyance, encumbrance, pledge, or transfer of the interest or a contract therefor.'<sup>657</sup> Similarly, a written waiver of the right to disclaim will bar a later attempt to disclaim.<sup>658</sup> Acceptance of the interest by the disclaimant<sup>659</sup> or the judicial sale of

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<sup>652</sup> KY. REV. STAT. ANN. § 394.620(1) (Michie/Bobbs-Merrill 1984).

<sup>653</sup> *Id.* § 394.620(2).

<sup>654</sup> *Id.* § 394.620(3).

<sup>655</sup> *Id.*

<sup>656</sup> *Id.* From the perspective of a title examiner, this provision for permissive recording of a disclaimed interest in real property should have been mandatory.

<sup>657</sup> *Id.* § 394.640(1)(a).

<sup>658</sup> *Id.* § 394.640(1)(b).

<sup>659</sup> *Id.* § 394.640(1)(c).

the interest for the account of the disclaimant before the disclaimer is effected also bars the right to disclaim.<sup>660</sup>

The disclaimant is not barred from disclaiming by outside events or limitations placed on his interest. For example, as a taking by eminent domain is unrelated to the satisfaction of the disclaimant's obligations, a timely disclaimer of the proceeds of a condemnation action is not barred by such a judicial proceeding.<sup>661</sup> Also, the right to disclaim is not barred if the interest is subject to a spendthrift limitation, such as those imposed on trust beneficiaries, or similar restrictions.<sup>662</sup> If a valid disclaimer or a written waiver of the right to disclaim is made, it binds the disclaimant and all persons claiming through or under the disclaimant.<sup>663</sup>

In all cases of intestate disclaimers and in cases where a testator or donee of the power has not provided otherwise, the disclaimed interest, regardless of its character as a present or future interest, devolves as if the disclaimant had predeceased the property owner or the donee of the power.<sup>664</sup> In intestacy, if the decedent were survived by two children, one of whom disclaimed and had three children of her or his own, the nondisclaiming child would take only half of the estate. The issue of the disclaimant would share the other half equally because the estate is distributed as if the decedent had been survived by only one child and the issue of a predeceased child.

Similarly, future interests that take effect at the termination of the disclaimed interest take effect as if the disclaimant had predeceased the property owner or the donee of the power.<sup>665</sup> For example, if a testator left Blackacre to "my daughter for life, remainder to her children who survive her" and the daughter disclaimed with two children alive, the remainder is accelerated. That is, the two children of the daughter take a present fee interest in Blackacre at the death of the testator. Each is a tenant in common with an undivided one-half interest in the land even though these children might actually predecease their mother or more children might be born later to their mother.<sup>666</sup>

Because the statute expressly provides that a disclaimer relates back "for all purposes" to the date of death of the property owner or the donee

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<sup>660</sup> *Id.* § 394.640(1)(d).

<sup>661</sup> UNIF. PROBATE CODE § 2-801(d) cmts., 8 U.L.A. 168 (1991).

<sup>662</sup> KY. REV. STAT. ANN. § 394.640(2) (Michie/Bobbs-Merrill 1984).

<sup>663</sup> *Id.* § 394.640(3).

<sup>664</sup> *Id.* § 394.630.

<sup>665</sup> *Id.*

<sup>666</sup> UNIF. PROBATE CODE § 2-801(c) cmts., 8 U.L.A. 165-66 (1991).

of the power,<sup>667</sup> the Act affects the rights of taxing authorities, creditors of the disclaimant, and the disclaimant's surviving spouse. Regardless of the disclaimant's motive for the disclaimer, the disclaimed property is never part of the disclaimant's estate.<sup>668</sup> Therefore, the disclaimer is not treated as a gift by the disclaimant. The dower rights of the disclaimant's spouse never attach to the disclaimed property, and the disclaimant's creditors have no claim to the property for satisfaction of the disclaimant's debts. In fact, the creditors are not even entitled to notice of the disclaimer.<sup>669</sup>

The Act is the exclusive method of disclaimer for intestate takers, devisees, legatees, other beneficiaries under a testamentary instrument, appointees under an exercised testamentary power of appointment, and those succeeding to such disclaimed interests.<sup>670</sup> Although the Act supplants the common law right of such persons to disclaim, the Act does not affect one's right to waive, release, disclaim, or renounce under other statutes.<sup>671</sup> Specifically, the Act does not affect the surviving spouse's right to renounce under KRS section 394.080<sup>672</sup> or the right of the donee of a power to renounce the power under KRS section 386.095.<sup>673</sup>

Finally, the Act does not govern disclaimers by a grantee of an inter vivos conveyance, a donee of an inter vivos gift, a surviving joint tenant, a beneficiary under a nontestamentary instrument or contract, a person succeeding to any such interest, or an appointee under a power of appointment exercised by a nontestamentary instrument. Such nontestamentary disclaimers are governed by the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act.<sup>674</sup>

### *E. Ancestral Property*

At the common law, "ancestral property" was real property that the decedent acquired by intestate succession (descent) from an ancestor. The normal rules of intestate succession were altered because of the ancestral source of the realty. Upon the decedent's intestate death without issue, ancestral property, unlike other property, was inheritable only by

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<sup>667</sup> KY. REV. STAT. ANN. § 394.630 (Michie/Bobbs-Merrill 1984).

<sup>668</sup> UNIF. PROBATE CODE § 2-801(c) cmts., 8 U.L.A. 166 (1991).

<sup>669</sup> *Id.*

<sup>670</sup> KY. REV. STAT. ANN. § 394.650 (Michie/Bobbs-Merrill 1984).

<sup>671</sup> *Id.*

<sup>672</sup> *Id.* § 394.080.

<sup>673</sup> *Id.* § 386.095.

<sup>674</sup> *Id.* § 394.035.

collateral relatives of the decedent who were also of the blood of the ancestor who first purchased the property.<sup>675</sup>

The purpose of this doctrine of ancestral property was to keep real property within the blood family into which it was originally brought.<sup>676</sup> The doctrine was strictly applied. For example, assume the decedent died intestate without issue owning Blackacre, a piece of land which the decedent had acquired by intestate succession from her or his father who had been the first purchaser of the land. Only paternal collateral relatives of the decedent could succeed to the ownership of Blackacre. If the decedent died survived by a half-blood sibling through the decedent's mother and a paternal first cousin, the paternal first cousin inherited Blackacre because the half-blood sibling was not related to the decedent's father who first purchased the land. If there were no relatives of both the decedent and the father who survived the decedent, but only the maternal half-blood sibling, the land did not pass to this maternal collateral relative of the decedent. Instead, the land escheated to the state.<sup>677</sup>

Most American jurisdictions no longer distinguish between ancestral real property and other real property that the decedent died owning.<sup>678</sup> However, consistent with its emphasis on keeping intestate property within bloodlines, Kentucky continues to recognize by statute a modified form of the ancestral property doctrine.<sup>679</sup> When applicable, the ancestral property statute overrides or limits the general laws relating to the descent of real property.

Kentucky's ancestral property statute distinguishes between adult and minor decedents in its application. If an adult decedent dies intestate and without issue, and if the decedent died owning real estate acquired by gift from a parent and the parent who made the gift survives, the real property passes back to the donor parent to the exclusion of the decedent's other parent. If the parent who made the gift does not survive the adult decedent, however, the realty passes under the normal rules for the descent of realty without regard to its ancestral origin.<sup>680</sup>

If the decedent is a minor who died intestate and without issue owning realty acquired by inter vivos gift, intestate succession or devise from a parent, there is a more radical departure from the general pattern

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<sup>675</sup> ATKINSON, *supra* note 3, at 39. A person was the first purchaser of the land if she or he obtained it by any manner other than descent. *Id.* at n.9.

<sup>676</sup> *Id.* at 77.

<sup>677</sup> *Id.* at 39 n.9.

<sup>678</sup> *Id.* at 77.

<sup>679</sup> KY. REV. STAT. ANN. § 391.020 (Michie/Bobbs-Merrill 1984).

<sup>680</sup> *Id.* § 391.020(1).

of succession to realty. In the case of a minor decedent, if the parent who made the gift survives the minor decedent, the result is the same as when the decedent is an adult. The whole of the real property returns to the donor parent. However, if the donor parent does not survive the minor decedent, the land descends only to the kindred of the donor parent.<sup>681</sup> Further, the normal pattern of intestate succession to the land is restored only if the kindred of the donor parent who survive the decedent are more remotely related to the decedent than grandparents, aunts and uncles, and their descendants.<sup>682</sup>

Both the common law doctrine of ancestral property and Kentucky's ancestral property statute apply only to real property and do not apply to gifts of money or other personalty that the decedent acquired from the ancestral source and died owning.<sup>683</sup> If, during the decedent's lifetime, real estate acquired from a parent is converted into money (personalty), the question arises at the decedent's death whether the proceeds of the conversion are realty subject to the dictates of the ancestral property statute or personalty which is exempt from the statute. Regardless of whether the conversion was the product of a volitional act of the decedent (a sale), a nonvolitional act (a mortgage foreclosure), or a compulsory taking (a condemnation proceeding), if the decedent was *sui juris*<sup>684</sup> at the time of the conversion, the proceeds are personalty.<sup>685</sup> However, when real property of a person who is not *sui juris* is converted by a guardian or a committee for that person pursuant to some compulsory, statutory power, the courts have held that although the proceeds are personalty for some purposes, they are realty for purposes of inheritance.<sup>686</sup>

In *McCoy v. Ferguson*,<sup>687</sup> for example, the proceeds of a lawful condemnation of land of an infant were treated as personalty in the hands of the infant's guardian from the time the guardian received the proceeds until the ward's death. After the death of the minor ward, however, the remaining proceeds were realty for purposes of intestate inheritance. As the real property taken in the condemnation proceeding had been inherited by the infant decedent from a parent, the remaining proceeds

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<sup>681</sup> *Id.* § 391.020(2).

<sup>682</sup> *Id.*

<sup>683</sup> *Guier v. Bridges*, 70 S.W. 288, 289 (Ky. 1902).

<sup>684</sup> *Sui juris* literally means "of his own right." In this context the term refers to one who has "the capacity to manage one's own affairs" or who is "not under a legal disability to act for one's self." BLACK'S LAW DICTIONARY 1602 (4th ed. 1957).

<sup>685</sup> *McCoy v. Ferguson*, 60 S.W.2d 931, 933 (Ky. 1933).

<sup>686</sup> *Id.*

<sup>687</sup> 60 S.W.2d 931 (Ky. 1933).

were subject to the dictates of the ancestral property statute.<sup>688</sup> Thus, the proceeds passed to the kindred of the donor parent.<sup>689</sup> In an earlier case,<sup>690</sup> the court relied on a specific statute, which was repealed by the time *McCoy* was decided, to distribute the proceeds from the sale of real estate that the minor had inherited from her father to the paternal aunts and uncles to the exclusion of the infant's mother.<sup>691</sup> The *McCoy* decision, however, clearly rests on a policy decision, not on a statute. A judicial sale of an infant's land does not exempt the proceeds of the sale from the operation of the statutes controlling the descent of real estate including the mandates of the ancestral property statute.<sup>692</sup>

At the common law, only real estate that the decedent acquired by descent from an ancestor was classified as ancestral property.<sup>693</sup> Kentucky's definition of statutory ancestral property is broader. The definition includes real property of an adult decedent acquired by inter vivos gift and real property of a minor decedent acquired by inter vivos and testamentary gift as well as by descent from a parent.<sup>694</sup>

If a purported sale of realty by a parent to a child is actually a gift of the land, the court will ignore the form of the conveyance and treat the land as realty subject to the ancestral property statute. In *Yaden v. Moore*,<sup>695</sup> because the father was in financial difficulty, he executed a deed to a farm to his adult son. When the son subsequently predeceased his father and mother without issue, the court treated the transfer as a gift, and not as a sale, of the land because the father had received only nominal consideration. Consequently, the entire farm passed to the father under the ancestral property statute to the complete exclusion of the decedent's mother.<sup>696</sup>

Kentucky's ancestral property statute is narrower than the common law doctrine in one respect. Under the statute, the ancestral source of the real property must be the decedent's parent,<sup>697</sup> whereas the common law

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<sup>688</sup> *Id.* at 932-33.

<sup>689</sup> KY. REV. STAT. ANN. § 391.020(2) (Michie/Bobbs-Merrill 1984).

<sup>690</sup> *McDonald v. Weisiger*, 100 S.W. 832 (Ky. 1907).

<sup>691</sup> *Id.* at 833.

<sup>692</sup> *McCoy*, 60 S.W.2d at 932. *Contra* *Layne v. Clark*, 153 S.W. 437, 440 (Ky. 1913) (treating proceeds from timber severed during infant donee's lifetime as personality and as not subject to ancestral property statute).

<sup>693</sup> ATKINSON, *supra* note 3, at 39.

<sup>694</sup> KY. REV. STAT. ANN. § 391.020(1)-(2) (Michie/Bobbs-Merrill 1984).

<sup>695</sup> 24 S.W.2d 927 (Ky. 1930).

<sup>696</sup> *Yaden*, 24 S.W.2d at 927-28; *see also* *Bagby v. Bagby*, 152 S.W. 537 (Ky. 1913) (conveying a gift of property from the decedent son's mother back to her on his death, to the exclusion of the decedent's father).

<sup>697</sup> KY. REV. STAT. ANN. § 391.020(1)-(2) (Michie/Bobbs-Merrill 1984).



doctrine contained no such limitation. Under the common law, the source of the realty could be any ancestor of the decedent.<sup>698</sup> As the Kentucky statute is strictly construed,<sup>699</sup> if the source of the intestate's title to real property is a grandparent<sup>700</sup> or sibling,<sup>701</sup> the property descends without reference to the provisions of the ancestral property statute. Even if the sibling's title that the decedent inherited originally came from the decedent's parent, the ancestral property statute is still inapplicable.<sup>702</sup> In one case,<sup>703</sup> upon the death of the father, a brother and sister inherited equal one-half interests in a vested remainder that their father had owned at his death. The sister subsequently died an infant survived by her brother and her mother. The brother thereafter died an infant survived by his mother and paternal kindred. The one-half interest in the vested remainder that the brother had inherited directly from his father descended to his father's kindred, not to his mother, because it was a real property interest subject to the ancestral property statute. The decedent's remaining fractional interest in the vested remainder descended to his mother without reference to the ancestral property statute because the decedent's sister, not his father, had been the source of the intestate's title to that fractional interest.<sup>704</sup>

Other questions have arisen concerning the source of the decedent's title to real property that the decedent owned at death. Even if the decedent's interest in the land is a remainder interest rather than a present possessory fee, it is distributed in accordance with the provisions of the ancestral property statute if the remainder was created in favor of the decedent by a parent.<sup>705</sup> If, on the other hand, a grandparent or someone else creates a life estate in the decedent's parent with a remainder in favor of the decedent, the source of the decedent's title is the creator of the interest, the grandparent, not the life tenant parent.<sup>706</sup> Therefore, that remainder interest is not ancestral property.

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<sup>698</sup> ATKINSON, *supra* note 3, at 39.

<sup>699</sup> Guier v. Bridges, 70 S.W. 288, 289 (Ky. 1902).

<sup>700</sup> Huffman v. Hatcher, 198 S.W. 236, 236 (Ky. 1917); Turner's Trustee v. Washington, 80 S.W. 460, 462 (Ky. 1904); Smith's Ex'r v. Smith, 65 Ky. (2 Bush) 520, 521 (1866); Duncan v. Lafferty's Adm'r, 29 Ky. (6 J.J. Marsh.) 46, 46 (1831).

<sup>701</sup> Conlee v. Conlee, 190 S.W.2d 43, 45 (Ky. 1945).

<sup>702</sup> *Id.*

<sup>703</sup> Conlee v. Conlee, 190 S.W.2d 43 (Ky. 1945).

<sup>704</sup> *Id.* at 45.

<sup>705</sup> See, e.g., Walden v. Phillips, 5 S.W. 757, 758 (Ky. 1887) (father conveyed land to his wife for life, remainder to their children).

<sup>706</sup> See Huffman v. Hatcher, 198 S.W. 236, 238 (Ky. 1917) (great-grandparent was the source); McDowell v. Kent, 194 S.W. 374, 375 (Ky. 1917) (grandparent was the source); Guier v. Bridges, 70 S.W. 288, 288-89 (Ky. 1902) (non-relative was the source); Cooksey v. Hill, 50 S.W. 235, 238 (Ky. 1899) (grandparent was the source); Smith's Ex'r v. Smith,

In *Cooksey v. Hill*<sup>707</sup> both the will of the decedent's grandfather and the will of the decedent's mother purported to convey the land in question to the decedent.<sup>708</sup> The court interpreted the will of the grandfather, who had died first, as devising a defeasible fee to his daughter (the decedent's mother) subject to divestment in favor of her children if she died leaving any. When that in fact happened, her child (the decedent) took the land in question as a devisee of a shifting executory interest under the grandfather's will. The provisions of the mother's will purporting to leave the same land to the decedent were without effect. The mother had no interest in the land at her death to devise because the divesting condition (death with children surviving) had occurred.<sup>709</sup> Hence, whether the grandparent conveys a present fee interest or a future interest in land to the decedent, the grandparent, not the parent, is the source of the decedent's title and the property interest is not subject to the ancestral property statute.<sup>710</sup>

The court determined in *Guier v. Bridges*<sup>711</sup> that the decedent's land does not have a parental source if the parent merely paid the price of the land to the owner who, in turn, conveyed title to the child.<sup>712</sup> The stranger is treated as the source of the decedent's title, making the ancestral property statute inapplicable. In *Connell v. Harper*,<sup>713</sup> however, the court looked beyond the form of the transaction in determining whether the decedent's realty had a parental source. Rather than treating the third party as the source of the title, the court treated her or him as merely the vehicle through and by which the interest of the parents in the land was ultimately transferred to the decedent. In *Connell*, a woman contemplating marriage transferred real property to her sister in trust without any indication of the trust purpose.<sup>714</sup> Her sister then transferred the property in trust back to the woman for life, remainder to the woman's children. These transfers were intended to shelter the land from liability for the debts of the woman's intended spouse. The woman then married, a child was born, and the woman died. After the child's

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65 Ky. (2 Bush) 520, 521 (1866) (grandparent was the source); *Duncan v. Lafferty's Adm'r* 29 Ky. (6 J.J. Marsh.) 46, 46 (1831) (grandparent was the source).

<sup>707</sup> 50 S.W. 235 (Ky. 1899).

<sup>708</sup> *Id.* at 236.

<sup>709</sup> *Id.* at 238.

<sup>710</sup> *Cooksey*, 50 S.W. at 238 (executory interest); see also *Huffman*, 98 S.W. at 238 (vested remainder); *Smith's Ex'r*, 65 Ky. (2 Bush) at 521 (fee simple).

<sup>711</sup> 70 S.W. 288 (Ky. 1902) (parent paid the purchase price).

<sup>712</sup> *Id.* at 289.

<sup>713</sup> 259 S.W. 1017 (Ky. 1924).

<sup>714</sup> *Id.* at 1018.

death, the court determined that the child's mother, not the mother's sister, was the source of the child's title to the realty.<sup>715</sup> As the child had died an infant and without children while owning realty acquired from a parent, the ancestral property statute applied. The realty descended to the maternal grandfather of the child, not to the child's own father.<sup>716</sup>

The decedent's acquisition of an interest in land from the estate of a grandparent by either intestate inheritance or operation of the state's antilapse statutes is property inherited from a grandparent and not ancestral property inherited from a parental source. In *Duncan v. Lafferty's Administrator*,<sup>717</sup> the grandfather died intestate leaving a tract of land. Because the grandfather's daughter had predeceased him, the land passed to his daughter's child<sup>718</sup> under a statutory provision requiring representation in the event that a child of the decedent dies before the decedent.<sup>719</sup> The son of the deceased daughter took his share directly from the decedent as the grandfather's intestate taker. Since the grandfather was the source of title to the realty, the ancestral property statute was inapplicable. In *Banks v. Cornelison*,<sup>720</sup> a woman devised real property to her husband, but he predeceased her. Under the applicable antilapse statute,<sup>721</sup> if a will beneficiary dies before the testator leaving issue who survive the testator, the issue take the estate devised unless a different disposition is made or is required by the terms of the will. Therefore, by operation of the antilapse statute, the child of the testator took the land as a beneficiary under his mother's will and not as his father's intestate taker. When the child later died an infant without issue, the land passed under the ancestral property statute to the kindred of his mother, rather than to the child's paternal grandparents, because his mother was the source of title.<sup>722</sup> Note that if the child's mother had died first and then her husband had died intestate, the source of the child's title to the land would have been the father, and the paternal grandparents would have inherited the property.

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<sup>715</sup> *Id.* at 1019-20.

<sup>716</sup> *Id.* at 1020.

<sup>717</sup> 29 Ky. (6 J.J. Marsh.) 46 (1831).

<sup>718</sup> *Id.*

<sup>719</sup> KY. REV. STAT. ANN. § 391.040 (Michie/Bobbs-Merrill 1984) (corresponds to I Dig., 438 § 6 (1796), which was the statute in effect at the time).

<sup>720</sup> 169 S.W. 502 (Ky. 1914).

<sup>721</sup> KY. REV. STAT. ANN. § 394.400 (Michie/Bobbs-Merrill 1984) (issue of dead devisee or legatee take parent's share); see also *id.* § 394.410 (death of part of the group of devisees before the testator); *id.* § 394.500 (void or lapsed devise included in residuary).

<sup>722</sup> *Banks*, 169 S.W. at 503.

The parental source of an intestate's title to real property activates the ancestral property statute only if the decedent dies without issue.<sup>723</sup> Under early case law, the court found that a child born out of wedlock was issue of the mother, but not of the father. Therefore, a mother with a surviving child born out of wedlock would die with issue, whereas the father of such a child would be a decedent who died without issue.<sup>724</sup>

In another early case,<sup>725</sup> real estate had been devised to out-of-wedlock children by the father's will. When one of the children died an infant without issue, the court held that the infant's mother and his whole-blood sibling, who was also an out-of-wedlock child of the infant's father, inherited the real estate to the exclusion of the decedent's half-blood sibling who had been born in wedlock to the decedent's father and another woman. The ancestral property statute directing that the property of an infant decedent who dies without issue descends to the donor parent or that parent's kindred was not applicable because the statute was found to apply only to property derived from a legal parent. According to the court, the father of a child born out of wedlock is not the child's legal parent unless the father and mother married.<sup>726</sup> In reaching its decision in both cases, the court relied upon a statutory provision that permitted an out-of-wedlock child to inherit by, from, and through her or his mother, but not her or his father unless the father and mother married.<sup>727</sup> The continued validity of these decisions is suspect in light of the Kentucky Supreme Court's ruling in *Pendleton v. Pendleton*.<sup>728</sup>

In *Pendleton* the court declared unconstitutional Kentucky's statute on inheritance rights<sup>729</sup> of children born out of wedlock.<sup>730</sup> The Kentucky legislature has enacted KRS section 391.105 to replace the unconstitutional one. Under the new statute, the inheritance rights of children born out of wedlock in their mother's estate are coextensive with the maternal inheritance rights of children born in wedlock. However, the inheritance rights of children born out of wedlock by, through, and from their father depends upon proof that the parents attempted a marriage or an adjudica-

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<sup>723</sup> See KY. REV. STAT. ANN. § 391.020 (Michie/Bobbs-Merrill 1984).

<sup>724</sup> *Cherry v. Mitchell*, 55 S.W. 689, 690 (Ky. 1900).

<sup>725</sup> *Blankenship v. Ross*, 25 S.W. 268 (Ky. 1894).

<sup>726</sup> *Id.* at 269.

<sup>727</sup> *Cherry*, 55 S.W. at 690; *Blankenship*, 25 S.W. at 269; see also KY. REV. STAT. ANN. § 391.090 (Michie/Bobbs-Merrill 1984) (corresponds to § 5, c. 31, Gen. St., which was the statute in effect at the time).

<sup>728</sup> 560 S.W.2d 538 (Ky. 1977); see also *Fykes v. Clark*, 635 S.W.2d 316, 318 (Ky. 1982) (permitting intestate inheritance by an out-of-wedlock, posthumous heir).

<sup>729</sup> *Pendleton*, 560 S.W.2d at 539.

<sup>730</sup> *Id.*

tion of paternity.<sup>731</sup> If a father who died owning realty that he acquired from a parent was survived by a child born out of wedlock and the out-of-wedlock child satisfied the requirements of KRS section 391.105, the father would be survived by issue and the ancestral property statute would be inapplicable. Similarly, if an infant born out of wedlock died owning real estate acquired from the father by testamentary or inter vivos gift or by intestate succession and the requirements of KRS section 391.105 were satisfied, the property would be ancestral property and would descend to the father, if living, or to the kindred of the father, if the father were deceased.

The ancestral property statute also treats adopted and posthumous children as issue. In *Lanferman v. Vanzile*,<sup>732</sup> when an adopted infant child died without issue and owned real estate derived from an adopted parent, the property descended to the adoptive parent's kindred.<sup>733</sup> This result is consistent with the statutory provision requiring that adopted children be treated the same as the biological children of the adopting parents for all purposes, including inheritance.<sup>734</sup> In *Lamar v. Crosby*,<sup>735</sup> a case involving a posthumous child, a daughter died owning realty acquired by testamentary gift from her father. As a posthumous child of the deceased father, the daughter shared the ancestral property with other children of the father because they were all kindred of the parent.<sup>736</sup> When the daughter later died, the land descended under the ancestral property statute to her siblings, to the exclusion of her mother.<sup>737</sup>

Because the decedent's age at death determines the inheritance rights of the kindred of a donor parent in ancestral property, litigation has arisen concerning the factual question of the decedent's age. In *Bertram v. Witherspoon's Administrator*,<sup>738</sup> the decedent died owning land that he had inherited from his mother. He was survived by two half-blood siblings through his father as well as by a full-blood maternal aunt. Under the first section of the ancestral property statute, if the decedent were over the age of majority at death, the real property derived from his mother would not return to her because she had not survived the

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<sup>731</sup> KY. REV. STAT. ANN. § 391.105 (Michie/Bobbs-Merrill 1984).

<sup>732</sup> 150 S.W. 1008 (Ky. 1912).

<sup>733</sup> *Id.* at 1011.

<sup>734</sup> KY. REV. STAT. ANN. § 199.520(2) (Michie/Bobbs-Merrill 1984).

<sup>735</sup> 172 S.W. 693 (Ky. 1915).

<sup>736</sup> *Id.* at 694.

<sup>737</sup> *Id.*

<sup>738</sup> 127 S.W. 533 (Ky. 1910).

decedent.<sup>739</sup> The land would, instead, pass under the general statute of descent to the decedent's two half-blood siblings.<sup>740</sup> In contrast, if the decedent were a minor at death, the second section of the statute would apply. Under that provision the land derived from the decedent's mother would return to her kindred and the maternal aunt would take it.<sup>741</sup>

Both the maternal aunt and the half-blood siblings in *Bertram* introduced testimony of individuals who supported the parties' respective assertions concerning the decedent's age at death. Although a larger number of witnesses supported the aunt's contention that the decedent died an infant, the court did not rely on this numerical superiority in resolving this purely factual question. Instead, the court relied on evidence that the decedent had placed his date of birth such that it made him an adult at his death and that the decedent had settled his accounts with his guardian before his death. The court also gave credence to statements of the aunt before the decedent's death that the decedent was of age and to the entry of his date of birth in the family Bible. This evidence persuaded the court that the decedent was an adult at death. As the parental source of this adult decedent's realty had predeceased the decedent, the real property passed under the general statute of descent to the decedent's surviving half-blood siblings, rather than under the ancestral property statute to his maternal aunt.<sup>742</sup>

Application of the second section of the ancestral property statute, which provides for inheritance by the kindred of the parental source of the land when the decedent dies an infant, can work a hardship on the nondonor parent. It can also cause property to pass to more distantly related relatives of the decedent to the exclusion of more closely related ones as well as other anomalous results that are not in harmony with the statutory purpose of keeping realty in the family bloodline of the source.

For example, application of the statute has resulted in grandparents taking realty of an infant decedent to the exclusion of the infant's surviving parent because the grandparents were the kindred of the donor parent.<sup>743</sup> Similarly, the statute has excluded a surviving parent from

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<sup>739</sup> *Id.* at 533-34; see KY. REV. STAT. ANN. § 391.020(1) (Michie/Bobbs-Merrill 1984).

<sup>740</sup> KY. REV. STAT. ANN. § 391.010(3) (Michie/Bobbs-Merrill 1989).

<sup>741</sup> *Bertram*, 127 S.W. at 533-34; see KY. REV. STAT. ANN. § 391.020(2) (Michie/Bobbs-Merrill 1984).

<sup>742</sup> *Bertram*, 127 S.W. at 534.

<sup>743</sup> *Carr v. Hart*, 22 S.W.2d 432, 433-34 (Ky. 1929) (excluding decedent's mother in favor of the paternal grandparent); *Connell v. Harper*, 259 S.W. 1017, 1029 (Ky. 1924) (excluding decedent's father in favor of the maternal grandparent).

sharing in the infant decedent's real estate with siblings of the deceased donor parent (aunts and uncles of the decedent)<sup>744</sup> and with children of the deceased donor parent by another spouse.<sup>745</sup> Grandparents have taken ancestral realty to the exclusion of half-blood siblings of the infant decedent because the shared parent was the nondonor parent, while the grandparents were kindred of the donor parent.<sup>746</sup> For the same reason, cousins of an infant decedent who were kindred of the donor parent took to the exclusion of half-blood siblings of the decedent.<sup>747</sup> Aunts and uncles who were siblings of the donor parent have also excluded half-blood siblings of the decedent who were not issue of the donor parent.<sup>748</sup>

Not all kindred of the donor parent can take realty of an infant decedent and exclude the decedent's other parent and that parent's kindred. The statute does not permit kindred of the donor parent who are more remotely related to the decedent than grandparents, aunts or uncles, and their descendants to exclude kindred of the nondonor parent from sharing in property classified as ancestral property.<sup>749</sup> However, this limitation still permits first cousins of every degree to qualify as descendants of grandparents or aunts or uncles and to exclude the nondonor parent as well as any kindred of that parent.<sup>750</sup>

The kindred who take the real property of a minor decedent under the second section of the statute, while the kindred of the donor parent, are not necessarily the kindred of the ancestor who originally brought the realty into the family.<sup>751</sup> This provision occasionally works to take property out of the bloodline of the family that first acquired the land. In *Power v. Dougherty*<sup>752</sup> an infant inherited real property from his mother. His mother had obtained the land from her mother. When the infant died, he was survived by his maternal grandfather (the spouse of the first purchaser) and maternal aunts and uncles (issue of the first purchaser). The realty passed to his maternal grandfather under the

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<sup>744</sup> *Weisiger v. McDonald*, 76 S.W. 1080, 1082 (Ky. 1903).

<sup>745</sup> *Vanover v. Steele*, 190 S.W. 667, 670 (Ky. 1917).

<sup>746</sup> *McCoy v. Ferguson*, 60 S.W.2d 931, 933 (Ky. 1933).

<sup>747</sup> *Pulliam v. Parris*, 220 S.W. 1075, 1076 (Ky. 1920) (excluding half brother in favor of paternal cousins); *Carnes v. Bingham*, 119 S.W. 738, 739 (Ky. 1909) (excluding half brother in favor of maternal cousins).

<sup>748</sup> *Gaddie v. Hogan*, 205 S.W. 781, 782 (Ky. 1918) (excluding half brother in favor of maternal uncle).

<sup>749</sup> KY. REV. STAT. ANN. § 391.020(2) (Michie/Bobbs-Merrill 1984).

<sup>750</sup> See *Carnes v. Bingham*, 119 S.W. 738, 739 (Ky. 1909).

<sup>751</sup> See KY. REV. STAT. ANN. § 391.020(2) (Michie/Bobbs-Merrill 1984).

<sup>752</sup> 83 Ky. 187 (1885).

ancestral property statute because the grandfather was the closest kindred of the donor parent.<sup>753</sup> If the takers had been determined by their relationship to the ancestor who first brought the property into the family (the maternal grandmother of the decedent), as the common law doctrine would have done, the maternal aunts and uncles would have taken the property as issue of the first purchaser.<sup>754</sup> The property would then have stayed within the maternal grandmother's blood family instead of passing to the maternal grandfather, who was not a blood relative of the first purchaser.

Kentucky's statute regulating the inheritance rights of half-blood intestate takers sometimes affects the size of the share taken under the ancestral property statute by kindred of the donor parent. The half blood statute provides that when collaterals of the half and whole blood inherit together as a class, the half-blood kindred take only half as much as those intestate takers of the whole blood.<sup>755</sup>

In *White v. Hogge*<sup>756</sup> the father died survived by four children by a first marriage and three children by a second marriage. The widow and children of the second marriage inherited all of the father's land by the terms of his will. Thereafter, a child of the second marriage died as an infant without issue. The court determined that when ancestral property of an infant decedent passes to kindred of the donor parent because the donor parent predeceased the infant, the kinship relationship to the parent is the relevant one for determining the descent of the ancestral property.<sup>757</sup> All of the decedent's siblings were full-blood children of the donor father because a person cannot have descendants by the half blood. Therefore, the statute on the inheritance rights of half bloods was inapplicable because none of the donor parent's kindred were half-blood relatives to him.<sup>758</sup> The land that the infant child had inherited from his father passed in equal shares to the child's four half-blood and two full-blood siblings.

If the donor parent's surviving kindred had been a class of both full-blood and half-blood siblings of the donor (that is, two whole-blood and four half-blood siblings), the half blood statute would have been applicable.<sup>759</sup> The half-blood siblings of the donor parent would have

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<sup>753</sup> *Id.* at 188; see KY. REV. STAT. ANN. § 391.010(2) (Michie/Bobbs-Merrill 1984).

<sup>754</sup> ATKINSON, *supra* note 3, at 39 n.9.

<sup>755</sup> KY. REV. STAT. ANN. § 391.050 (Michie/Bobbs-Merrill 1984).

<sup>756</sup> 291 S.W.2d 22 (Ky. 1956).

<sup>757</sup> *Id.* at 25.

<sup>758</sup> *Id.*

<sup>759</sup> See *Holmes v. Lane*, 123 S.W. 318, 320-31 (Ky. 1909).



each taken one-eighth of the land, while the full-blood siblings of the donor parent would have each taken one-fourth of the land.

Recently, in *Francis v. Justice*,<sup>760</sup> Kentucky's Court of Appeals determined the proper interplay of the ancestral property and dower statutes when an infant dies without issue but survived by a spouse. The ancestral property statute provides that the donor parent or kindred of such parent should inherit the ancestral property.<sup>761</sup> On the other hand, the dower statute provides that a surviving spouse is entitled to a fee interest in one-half of the surplus realty that the deceased spouse was seized of at the time of death.<sup>762</sup> In *Francis* the court held that the surviving spouse is entitled to her or his dower share in the ancestral property. After the dower claim is satisfied, the ancestral property statute applies to determine the descent of the remaining land.<sup>763</sup>

Under the common law, a person's legal relationship to land determined her or his economic, social, political and legal status. The intent of the common law ancestral property doctrine to keep property within the blood family of the ancestor who first brought the property into the family served some recognizable purpose in such a society. In a contemporary, nonfeudal society, however, where wealth is most often accumulated in the form of personalty (money, stocks, bonds), there is no compelling reason to keep realty in the bloodline of the donor parent. The concept of ancestral property has become an anachronism. As it has outlived any contemporary usefulness, Kentucky's ancestral property statute ought to be repealed.

### CONCLUSION

In a feudal society, a system of intestate inheritance was predicated on the importance of consanguineous relationships and the maintenance of wealth within the blood line may have accurately reflected the average decedent's desires. The typical decedent in a post-industrial economy, however, is more likely to be motivated by a desire to provide for her or his spouse than by an intention to keep property within the family's blood line. Yet, Kentucky's current system of intestate inheritance continues to embody the common law's preference for consanguineous inheritance despite the fact that this preference often functions to the detriment of the surviving spouse's inheritance rights.

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<sup>760</sup> 687 S.W.2d 868 (Ky. Ct. App. 1985).

<sup>761</sup> KY. REV. STAT. ANN. § 391.020(2) (Michie/Bobbs-Merrill 1984).

<sup>762</sup> *Id.* § 392.020.

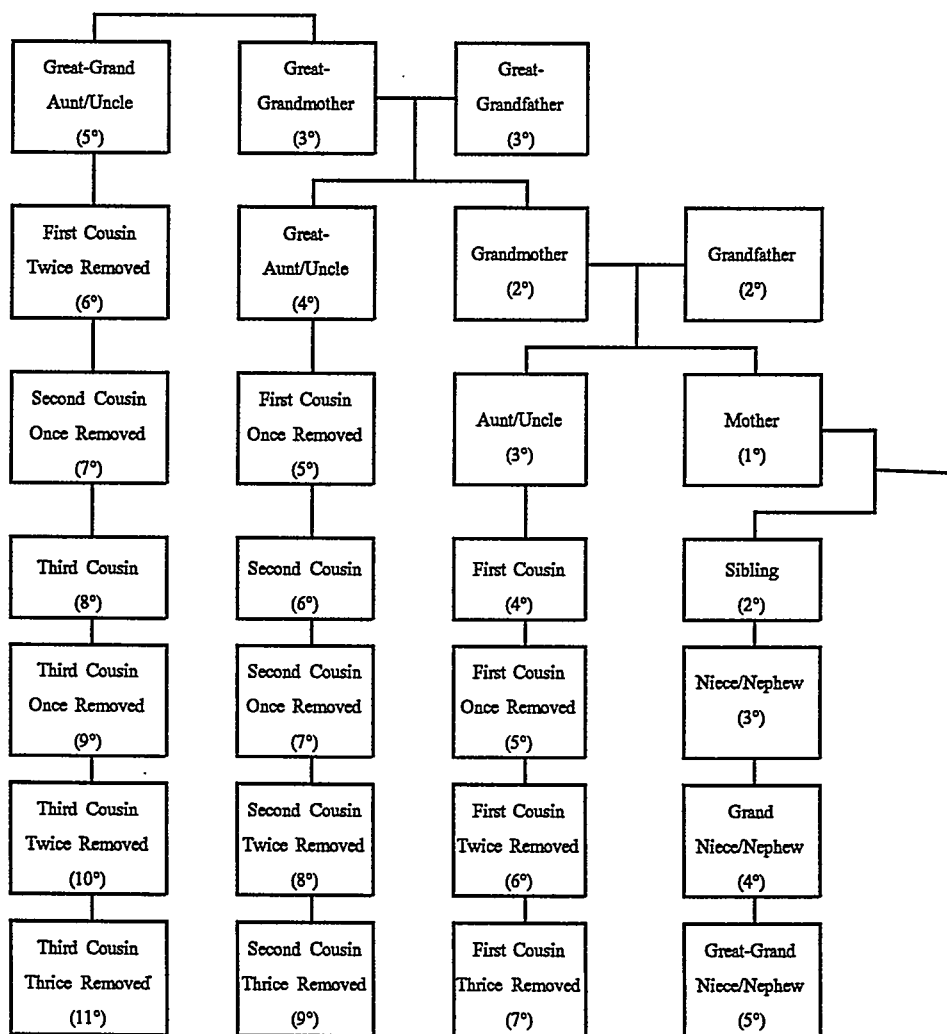
<sup>763</sup> *Francis*, 687 S.W.2d at 871.

In a similar vein, Kentucky's ancestral property statute and the legislature's failure to cut off inheritance by "laughing heirs" perpetuate the common law's bias in favor of intestate inheritance by blood relatives of the decedent. The half blood statute, which gives half-blood intestate takers only half as much as whole blood takers, is another example of how strongly the preference for inheritance by blood relatives influences the laws of intestate descent and distribution in Kentucky.

Kentucky's intestacy law also uses the common law's pure per stirpes system of representation for distributing intestate property among intestate takers who stand in different degrees of relationship to the decedent. As demonstrated in this Article, such a scheme of representation functions, in some instances, to create anomalous results. For example, it is possible in Kentucky for intestate takers who stand in the same degree of relationship to the decedent to inherit different amounts from the decedent's estate. Similarly, under Kentucky's system of pure per stirpes representation, intestate takers who stand in a closer degree of relationship to the decedent can inherit less than those who stand in a more remote degree of relationship to the decedent. Such results stand in sharp contrast to contemporary theories of intestate inheritance, which are based on the dual notions that decedents have the same degree of affection for all those who stand in the same degree of relationship to them and that decedents have a greater interest in providing for those relatives who stand in closer degrees of relationship than for those relatives who stand in more remote degrees of relationship to them.

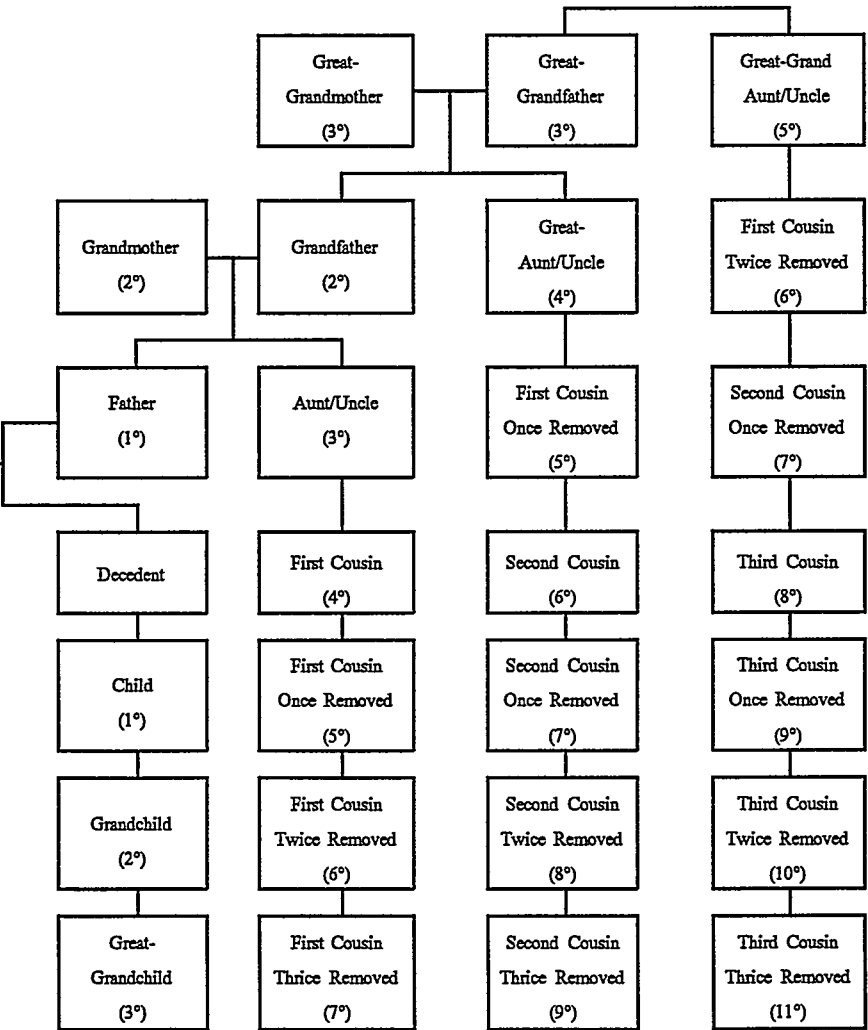
The time has come for Kentucky's legislature to reform its antiquated laws of intestate inheritance. Changes should be made in those statutory provisions which fail to approximate the manner in which average, contemporary decedents would divide their property if they were presented with the question.

## APPENDIX

CIVIL LAW DEGREES OF RELATIONSHIPSMATERNAL RELATIVES

APPENDIX

CIVIL LAW DEGREES OF RELATIONSHIPS



PATERNAL RELATIVES

